



J. Royle pinx.

R. White sculp.

*S^r Peyton Ventriss K^t.
Late one of the Justices of the Court
of Common Pleas.*



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54-16
Cam 16-34

T H E *Pole 16-34*
REPORTS

O F *9-13-23*

Sir Peyton Ventriss K^t
 Late One of the JUSTICES of the
COMMON-PLEAS.

In Two Parts.

The First PART

Containing Select **CASES** Adjudged in the
Kings-Bench, in the Reign of K. **CHARLES II.**

W I T H

Three Learned **ARGUMENTS**, One in the **Kings-Bench**,
 by Sir Francis North, when Attorney General; and Two in the **Erchequer**,
 by Sir Matthew Hale, when Lord Chief Baron.

With Two **TABLES**; One of the Cases, the other of the Principal Matters.

The Second PART

Containing choice **CASES** Adjudged in the **Common-Pleas**,
 in the Reigns of K. **CHARLES II.** and K. **JAMES II.** and in the Three first
 years of the Reign of His now Majesty K. **WILLIAM** and the late **Q. MARY**;
 while he was a **JUDGE** in the said Court: With the Pleadings to the same.

A L S O

Several **CASES** and **PLEADINGS** thereupon in the **Erchequer-Chamber**
 upon Writs of **E R R O R** from the **Kings-Bench**.

Together with many remarkable and curious Cases in the Court of **Chancery**.

Wherein are added

Three exact **TABLES**; One of the Cases, the other of the Principal Matters,
 and the third of the Pleadings.

With the Allowance and Approbation of the Lord Keeper and all the Judges.

L O N D O N:

Printed by the Assigns of Richard and Edward Atkyns, Esquires; for
 Charles Harper at the Flower-de-Luce, and Jacob Tonson at the Judges-
 Head, both over against St. Dunstan's Church in Fleetstreet, MDCXCVI.

WE all knowing the Great Learning and
Judgment of the Author, do (for the
Benefit of the Publick) approve of and allow
the Printing and Publishing of this Book,
Intituled, *The Reports of Sir Peyton Ventris Kt.*
Late One of the Justices of the Court of Common-
Plcas.

April the 20th,
1695.

J. Somers, C. S.
J. Holt,
Geo: Treby,
Ed: Nevill,
Joh. Powell,
W. Gregory,
N. Lechmere,
Tho. Rokeby
G: Eyre,
Jo: Turton,
John Powell,
Sam. Eyre.

THE
FIRST PART
OF THE
REPORTS
OF
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L A T E
One of the Justices
OF THE
COMMON-PLEAS.

CONTAINING
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Bings-Bench, in the Reign of King CHARLES II.

WITH
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when Attorney General :

And Two in the Exchequer, by Sir MATTHEW HALE,
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FIRST PART
REPORTS



TO THE
R E A D E R.

THE Name of the Reverend and Learned JUDGE, who was the Compiler of these *R E P O R T S*, will be a sufficient Invitation to the Understanding Reader, not only to cast his Eye upon ; but seriously to peruse them.

And as my Lord Coke in his *Commentary upon Littleton* (fol. 249. b.) says, That for the most part the latter Resolutions and Judgments are the surest, and therefore best to Season Students with at the Beginning, both for the settling of their Judgments, and retaining of them in Memory, and easier to be understood than the Ancient: So it is to be hoped that these following *R E P O R T S*, Collected with Care, Diligence and Experience, by the Learned Author thereof, will fully answer these Directions given by that before-mentioned Famous Lawyer.

To the Reader.

The Author of these *REPORTS* was so Eminent in his Profession of the *LAWS*, that should I presume to give a Character of him, it would come very short of His great Worth; and therefore I shall only commend him to the Courteous Reader, where he will find his own Character given by himself.

Vale.

THE

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ADVERTISEMENT.

Note, That the Author of these Reports, has referr'd to *Croke's Elizabeth* as the first Part, and *Croke's Charles* as the third Part of those Reports, except in the first thirty Sheets of the First Volume, in which thirty Sheets he referr'd to *Croke's Charles* of the first Edition as the first Part, and *Croke's Elizabeth* as the third Part of those Reports.

Term.

TERMINO
Sancti Michaelis,

Anno 20 Car. II. in Banco Regis.

Sparks, &c. versus Martyn.

JONES moved for a Prohibition to the Court of the Admiralty; for that they Libelled against one for Restring of a Ship; and taking away the Sails of it from one that was executing the Process of the Court against the said Ship; and for that in the presence of the Judge and face of the Court he Assaulted and Beat one, and spoke many opprobrious Words against him. Now seeing that these Matters were determinable at Law, the Ship being *infra corpus Comitatus*; and they could not adjudge Damages to the party, or Fine or Imprison; He prayed a Prohibition.

But the Court denied it, (*absentibus Windham & Moreton*); 1 Cro. 216. for they may punish one that resists the Process of their Court, and may Fine and Imprison for a Contempt to their Court, acted in the face of it, tho' they are no Court of Record; but if they should proceed to give the party Damages, they would grant a Prohibition quoad that: And of that Opinion was Wyndham, the Case being afterwards put to him by the Chief Justice. But the parties afterwards put into their Suggestion, That the original Cause upon which the Process was grounded, was a Matter whereof the Court of Admiralty had no cognisance: Wherefore a Prohibition was granted; for then the Process could be no Contempt.

Sir John How v. Sir Woolley, an Attorney of the Court.

It was Moved, That Woolley should put in special Bail, being an Attorney at Large, and having discontinued his Practice. But the Court said, Attorneys at Large have the same privilege with the Clerks of the Court; and are to appear *de die in diem*. And they were not satisfied that he had discontinued his Practice.

Suffil's Case.

It was moved to quash the Return of a Rescous against Suffil and divers others, who rescued a person taken upon Mesne Process; because the Rescuers being particularly named 'tis said rescuserunt, and not added quilibet eorum rescussit. And for that a Case was cited in the 2 Cro. where the Sheriff returns an Exigent against divers quod non comperuerunt, upon the Quinto exacti, and doth not add nec aliquis eorum comperuit; and for that cause it was Reversed in a Writ of Error, notwithstanding, Twisden being only in Court, held it to be well enough, it being in the Affirmative.

Anonymus.

A Prohibition was prayed to the Ecclesiastical Court, for that a Parson Libelled against one there for calling of him Knave, and was granted, it not appearing to relate to any thing concerning his Function: And a Case was cited to be Adjudged 24 of the Queen, the Suit being in the Ecclesiastical Court for these words, (viz.) Sir Frick, you are a Knave; and a Prohibition was granted.

Note, If a man be taken in Execution, he cannot be bailed, tho; he brings a Writ of Error.

Anonymus.

If Debt upon a Lease for years, the Defendant may plead Entry into part, upon which follows Suspension, and it doth not amount to the General Issue.

Heely versus Ward.

Error to Reverse a Judgment given in the Court at Hull, where the Plaintiff in an Assumpsit did declare, That at such a place, infra Jurisdictionem Curiz, the Defendant in consideration that the Plaintiff had assumed to pay him so much a year, promised to deliver him so many yards of Kersey; and it was assigned for Error, That the delivery is not to be at a place infra Jurisdictionem Curiz; and indeed there is no place at all. And of that Opinion was Twisden, (he being only in Court) and cited a Case, where in an Assumpsit in the Marshalsey, upon a Promise to make a Lease of a House in Middle Row, and after Judgment it was held Erroneous, because Middle Row was not to be infra Jurisdictionem Curiz.

The Bishop of *Lincoln* *versus* Smith.

THe Bishop of Lincoln sued in the Court holden before his Chancelloꝝ foꝝ a Pension, to which he intituled himself by Prescription, and a Prohibition was prayed foꝝ Smith the Defendant there: foꝝ that being by Prescription that Court had no cognisance of it: And foꝝ that my Loꝝd Coke's Opinion was cited, 2 Inst. 491. especially he could not sue foꝝ it in his own Court.

But it was resolved by Keeling and Twissden (the other Justices being absent) that Pensions, tho' they were by Prescription, might be sued foꝝ in that Court: foꝝ having cognisance of the Principal, that shall draw in the Accessory. As if one Libel foꝝ a Modus decimandi, if they allow it, they may try it; and Coke's Opinion they said was not warranted by the Books, and Fitzh. N.B. 524. is against it, and the Court being held before the Chancellor, and not the Bishop himself, he might sue there: Vide Hob. 87. Conusans of Pleas granted to be holden before the Steward of the Grantee, licet the Grantee fuerit pars. 2 Cro. 483.

Anonymus.

An Attachment was prayed against one, who being arrested upon a Latitat, gave a Warrant of Attorney to Confess a Judgment, and presently after snatched it out of his hand to whom it was delivered, and tore off the Seal: And the Court seemed to incline, in regard it was to Confess a Judgment in this Court that it was a Contempt, upon which an Attachment might be granted.

Anonymus.

A Prohibition was prayed, to stay a Suit in the Court Christian foꝝ Tythes, upon the suggestion of a Modus, which was alleged in this manner: That the Proprietors and Occupiers of such a Mannor, or any parcel thereof, should pay a Groat to the Parson for Herbage Tythes.

The Court held this could not be, foꝝ if a man had but two or three foot of Ground in the Mannor he should pay a Groat; but it ought to have been said: That the Proprietors and Occupiers of such a Mannor, for themselves and their Farmers, had paid Four pence.

Twissleton *versus* Hobbs.

Action foꝝ these Words, [You are a Forger of Bonds, a Publisher of Forgery, and Sue upon forged Bonds.]

The Jury found the Defendant Not Guilty, as to the first Words, and resolved the last Words were not Actionable, it not being laid that he knew of the Forgery.

Sir Thomas Griesley's Case.

Information against him for stopping the High-way, the word was *Obstupabat*. It was proved in Evidence, that he plowed it up; and Resolved it did well maintain the Information.

Anonymus.

In Debt, If the Defendant wage his Law, the Oath of the Eleven which are sworn de credulitate, may be dispensed with by the Plaintiffs assent. Vid. Mag. Charta, c. 28.

Note, It was Adjudged in the King's Bench, 19 Car. II. That if a Prisoner escape by the permission of the Sheriff, yet he may be taken by the party at whose Suit he was condemned; for it may be the Sheriff is Insufficient; and it is no reason that his own Act should dammifie the Plaintiff. Vide Hob. 202.

Termo Sancti Hillarij, Anno 20 & 21 Car. II.

In Banco Regis.

Barnes versus Bruddel.

Action for these Words, alledged to be spoken of the Plaintiff, (viz.) She was with Child by J. S. whereof she Miscarried; and concludes, That by reason thereof she was so brought into her Fathers displeasure that he turned her out of Doors, and that she was brought within the Penalty of the Statute of 18 Eliz. And in Maintenance of this Action a Case was cited out of Roll's 1st Part 35. inter *Meadows & Boyneham*, an Action was brought for calling of one Whore, *Per quod consortium amisit Vicini suorum*; and held it would lye. And in *Anne Davie's Case*, 4 Co. 17. it is held, That since the Statute of the 18 Eliz. cap. 3. to say, One had a Bastard, would bear an Action.

But notwithstanding the Opinion of the Court was, That such an Action would not lye unless a special Damage had been alledged, as to say, She had lost her Marriage, as in *Anne Davie's Case*; and the Reason upon the Statute alledged in the Case, was said by Twisden to be of my Lord Coke's putting in; for Justice Jones affirmed to him, there was nothing said thereof in the Case.

Anonymus.

Anonymus.

If a Tradesman contract Debts and after gives over Trading, he may be afterwards a Bankrupt within the Statute in respect of the Debts contracted before: And so it was said to be Ruled in Sir Job Harvies Case.

Anonymus.

A Warren may pay Tythes by Custom: So of Doves in a Dove-house, or Fish in a River.

Note, It was said by Twisden, That if a Libel be in the Ecclesiastical Court for a thing whereof they have cognisance, altho' the party intitles himself to it by Custom, no Prohibition lies.

Anonymus.

A Prohibition was prayed, for that they Cited him to answer Articles in the Ecclesiastical Court, and did not deliver a Copy of the Articles; and it was granted quousque they should deliver the Copy: But the Prohibition which was taken out was absolute, which the Court being informed of, they did not think fit to grant a Consultation, but to discharge that Prohibition by a Superedeas. Whereupon they proceeded and Excommunicated the party for default of Answering: Who again moved the Court for a Prohibition, and one was granted with a Mandamus in it, to absolve him, if it were for not Answering before they gave him a Copy of the Articles.

Bains & Biggerdale.

Error to Reverse a Judgment in an Action of Debt upon a Bond, in Rippon Court; because it was entred upon the Record, Assid' damna ultra misas & custagia ad 10 l. and doth not say, Occasione detentionis debiti, or Occasione predicta; and the Judgment was, Quod recuperet damna predicta, and doth not say, Per Juratores assessa: Yet notwithstanding the Judgment was affirmed.

Billingham

• Billingham & Vavasor.

Error to Reverse a Judgment in Debt, in the Court of York : Assigned,

First, In the Variance between the Count and Plaint; for the Plaint was Entred, *Ad hanc Curiam venit & queritur de Placito deb' super demand' 14 l.* and the Count was for 12 l. But it was Answered, That the certainty of the Sum needed not to be expressed in the Plaint, and so Surplusage. But otherwise it is of a Variance between the Original and the Count; for the Writ must comprehend the certainty of the Debt; and 2 Cro. 311. was cited where Debt was brought in the Common Bench for 40 s. and after the Return of the Pluries Capias the Entry was, *Quod Querens obtulit se in plito deb' 40 l.* and assigned for Error, and disallowed. But to that it was said, That that was but a Dissipation in the Entry of a Continuance which had a former Record to warrant it: And here, tho' the certainty of the Sum need not to have been expressed; yet when it is, the Plaint must not vary from it. *Et Adjornatur.*

Vid. 3 Cro.
619.

Bourne versus Mason & al'.

In an Assumpsit, the Plaintiff declares, That whereas one Parrie was indebted to the Plaintiff and Defendants in two several Sums of Money, and that a Stranger was indebted in another Sum to Parrie; that there being a Communication between them, the Defendants in Consideration that Parrie would permit them to sue in his Name the Stranger for the Sum due to him, they promised they would pay the Sum which Parrie owed to the Plaintiff; and alledged, that Parrie permitted them to sue, and that they Recovered. After Non assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff could not bring this Action, for he was a Stranger to the Consideration.

But in maintenance thereof a Judgment was cited in 1658. between Sprat and Agar, in the Kings-Bench, where one promised to the father, in Consideration that he would give his Daughter in Marriage with his Son, he would settle so much Land. After the Marriage the Son brought the Action; and it was Adjudged maintainable. And another Case was cited of a Promise to a Physician, That if he did such a Cure, he would give such a Sum of Money to himself, and another to his Daughter; and it was Resolved, the Daughter might bring an Assumpsit. Which Cases the Court Agreed: For in the one Case the parties that brought the Assumpsit did the Meritorious act, tho' the Promise was

Vid. 3 Cro.
619.

was made to another; and in the other Case, the nearness of the relation gives the Daughter the benefit of the consideration per-
formed by her Father; but here the Plaintiff did nothing of trouble to himself, or benefit to the Defendant, but is a mere Stran-
ger to the Consideration; wherefore it was adjudged quod nihil
capiat per billam.

Herbert versus Merit.

A Prohibition was prayed to the Ecclesiastical Court, for that the Defendant libelled against the Plaintiff there, for calling of her Impudent Whore, which was said to be only a word of Pas-
sion; and the later Opinions have been, that unless some Act of Fornication were expressed that Prohibitions should be granted.

But the Court denied it in this case, it being an offence of a Spiritual Cognizance, and Eaton and Ailoffes Case, 1 Cro. 78. and Pewes Case 329, were cited.

The Sheriff may Sell Goods, he takes in Execution by a Fieri facias, at any Rates. If the Defendant denies to pay the Money.

Nota, No Action of Debt lies against the Sheriff when the Party escapes, who is taken upon a Meine Process, but an Action upon the Case only,

Vaughan & Loyd.

In an Audita Querela, the Party appeared upon the Sciri Facias, and demurred, for that the Sciri Facias bore Date the 23 day of October, and the Audita Querela the 3 of November after. To which it was said, that this fault in the Meine Process is aided by Appearance; but if an Original should bear Date upon a Sunday or the like, the Appearance of the Party would not help it. But on the other side it was said, that the Party had no day in Court by the Audita Querela, and this was a default in the first Process against him, and compared it to a Sciri Facias upon a Judgment, in which such a fault will not be cured by Appearance: To which the Court agreed. For there the Sciri Facias is the foundation, and quasi an Original, and the Judgment is given upon it; but here the Sciri Facias is only to bring in the Party to answer, and in the nature of a Meine Process, and the Judgment is given upon the Audita Querela; wherefore they disallowed the Demurrer. 1 Cro. 414

Barnes *versus* Hughes.

DEbt tam pro Domino Rege quam pro seipso, upon the Stat. of 5 Eliz. cap. 4. for exercising of the Trade of a Grocer in Salisbury, not being bound Apprentice thereunto. The Defendant pleads Nil debet, and being tried by Nisi prius, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Action could not be brought in this Court, for by the Stat. 21 Jac. cap. 4. It is Enacted that all offences against any penal Statute, for which an Informer may lawfully ground any popular Action, Bill, Complaint, Suit or Information before Justices of Assize, *Nisi prius* or Gaol-delivery, Justices of Oyer and Terminer, or of the Peace in their General Quarter-Sessions, shall be Commenced, Sued, &c. before the said Justices, they having power to hear and determine the same and not elsewhere; which Negative words, as it was said, take away the Jurisdiction of this Court: And whereas 31 Eliz. restrained not the Kings Attorney, because it only made mention of Common Informers; the Kings Attorney is expressly named in this Statute, and the Cases in, 2 Cro. 85. between Beane and Druge, and Moyl and Taylours Case, 2 Cro. 178. were quoted. And the Statute would be to little purpose, if it did not extend to Actions of Debt, as well as Informations and Indictments. But it was said on the other side, That it could not extend to Actions of Debt, for they could not be brought before Justices of Assize, or the other Justices named in the Act, and it shall only extend to such Suits as an Informer might lawfully Commence before them. And it hath been resolved, that this Act did give no new Jurisdiction, as 1 Cro. 112, Farrington and Keymer's Case, in an Information upon the Statute of 23 H. 8. cap. 4. for selling of Beer at an unlawful price, which gives the forfeiture to be Recovered in Courts, where no Protection or Wager of Law shall be allowed in any Suit grounded upon it; extends only to the Courts at Westminster, as 6 Co. in Gregory's Case it was resolved. That no Information for an offence against this Statute could be commenced before the Justices of Assize or Peace at the Sessions, notwithstanding the Act in 21 Jac. which ordains, That Suits for offences against Penal Laws shall be before them and the rest there mentioned; for the Act only extends to those offences, for the which an Informer might lawfully ground any popular Action before them, and it was never held that that Act gave any new Jurisdiction. Now if this Action cannot be brought in this Court, the Statute must Repeal a great part of the Remedies given by 5 Eliz. against this offence, and only leave it to be punished by Indictments and Informations, which certainly was never the intent of the Statute, and would be very mischievous; for if the Offender goes out of the County
after

after the offence committed, he cannot be punished; for the Justices named in the Statute cannot award Process out of the County, and therefore for that reason there should be remedy in a Court of General Jurisdiction, and since 21 Jac. there have been many Presidents of like Actions; all which would be Reversed, if that Act should take away Actions of Debt in this Court. And for these Reasons the Case being moved divers times, the Court gave Judgment for the Plaintiff. Styl. 340.

Anonymus.

In Debt upon an Obligation the Defendant pleads, That he delivered it as an Escrow, & hoc paratus est verificare. This Plea is vicious, for he ought to shew to whom he delivered it; and also he ought to conclude his Plea, & illinc nicat son fait.

Anonymus.

A Lease for Years is made to A. and then another Lease is made for Twenty years, to commence after the Expiration of the former Lease, if B. and C. shall so long live, with a reservation of several things, and reddend' 3 l. nom' Harlotte after the death of B. or C. B. dies during the continuance of the first Lease. The 3 l. must be paid; for it is not in the nature of a Rent, but a Sum in gross.

Clipsham and Morris.

The Plaintiff in an Assumpsit declared, That J. S. being indebted unto him in 50 l. gave him a Note, directed to the Defendant, requiring him to pay the Plaintiff the said Sum of 50 l. then he saith, That the Defendant upon view of the Note, in Consideration that the Plaintiff would accept of his Promise for the Money, and stay a fortnight for the same, he did assume to pay him.

To which the Defendant demurs for the Insufficiency of the Consideration; it being nothing of trouble or prejudice to the Plaintiff, or benefit to the Defendant, for he might sue his Debtor in the mean time; neither is it alledged, that the Defendant was indebted to J. S. But if it had been in Consideration, That the Plaintiff would accept of the Defendant for his Debtor, that might have been good; for that is an implied Discharge of the other, whom if he had sued, the Defendant might have had an Action, Roll's 1st Part 29. And for this Reason the Opinion of the Court was against the Plaintiff. And this Point was said to be Adjudged between Newcomen and Lee in this Court, Pasche 1650. Rot. 62. Styl. 249.

C

Anonymus.

Anonymus.

A Man was Indicted for saying, The Justices of the Peace had nothing to do with the Excise: And it was quashed by the Opinion of the Court; for such an Information could not make a man Criminal.

Nurste *versus* Hall.

The Grantee of a Reversion brings a Writ of Covenant against the Lessee for years, for non-payment of Rent. The Question was, Whether it ought to be laid where the Lease is alledged to be made; or, where the Land lies? It was said, That the Statute of 32 H.8. cap.34. which gives the Action of Covenant to the Assignee of the Reversion, saith, That they shall have such Actions in like manner, as the Lessors should have had. Now if it had been brought by the Lessor it had been transitory, and so in the Case of an Assignment by Commissioners of Bankrupt, the Assignee of the Commissioners of Bankrupt shall bring Debt as the first Creditor should have done.

But it was said on the other Side, That the Statute intended not to assign it as a bare Chose en Action, but to knit it to the Reversion; and where it saith, The Assignee shall have Remedy in like manner; that is, the same Remedy in substance: And in the case of the Bankrupt's Debt the Contract is only assigned. And in the 42 Ed.3. cap.3. it is said, That an Action of Covenant lay for the Assignee at the Common Law. But because the Court was not full, it was thought fit this Case should be Adjourned till the next Term.

Note, It was said in this Case, the *Modus Reddendum* makes a Covenant.

Day and Pitts.

A Prohibition was moved for to stay a Suit in the Spiritual Court, upon a Suggestion, that it was for calling one Old Thief, and Old Whore; and if there were any such Words spoken, they were spoken at the same time: Which Suggestion was not good; for the Words ought to have been fully confessed. And it was said by the Court, That this Matter ought to have been pleaded there, and if they had not admitted the Plea, then to move for a Prohibition, and not before.

Gilman

Gilman and Wright.

BUrgh moved against Wright (Steward of Havering Court in Essex) for refusing to admit Gilman an Attorney in this Court, to appear for a man in an Action sued against him there; alledging, That the Attorneys of the Courts of Westminster might Practise in any Inferiour Court; neither had they a Prescription or Charter to have a certain Number of Attorneys of their own, and to exclude others.

But because it was the general Usage of those Inferiour Courts to admit none but their own Attorneys, tho' the Court seemed to incline, That they ought not by Law to refuse Others; and it was said to be so Adjudged in the 15th of Car. i. in one Darcie's Case; yet they would be Advised until the next Term.

Note, One who is Subpoena'd for a Witness, may have a Writ of Privilege to protect him from Arrests in going and returning.

Anonymus.

A Prohibition was granted to the Court of the Marches of Wales; for that Lands being descended to an Infant, which were subject to a Trust, they had not only enjoyned the possession of those Lands, but of other Lands descended to him. And it was said by the Court, That they could not Sequester Lands at all, for the performance of a Decree of their Court to pay Money. For they can only agere in personam, & non in rem.

Termino Sanctæ Paschæ, Anno 21 Car. II.

In Banco Regis.

Anonymus.

The Sheriff Returned Non est inventus to a Writ brought against his own Bayliff, and delivered to him. But the Court Amerced him Forty shillings, and he was ordered to amend his Return.

Anonymus.

Trover and Conversion was brought against Baron and Feme, for that they ad usum proprium converterunt & disposuerunt; and held not to be good, because the Wife cannot Convert with her Husband.

Skinner and Gunter, &c.

2 Cro. 667.
Hob. 205,
266.

A Bill in the nature of Conspiracy was brought against Three, for that they, Conspirations inter eos habita, caused the Plaintiff to be Arrested in London, on purpose to ver him and have him Imprisoned, knowing that he was not able to find Bail, whereas they had no cause of Action. The Defendants pleaded Not guilty, and the Issue was found only against one of them.

It was moved in Arrest of Judgment, That the Declaration was Insufficient, because it was not declared that the first Action was determined; as no Conspiracy lies upon an Indictment before Acquittal.

But the Court inclined to disallow this; for here the ground of the Action, is the causeless troubling of him to put in Bail: But when a man is Indicted, he lies under the scandal of the Crime until he is acquitted.

Another Exception was, That this Bill being in the nature of a Writ of Conspiracy, there being One only found Guilty, the Action fails. But it was said, True, it is so in case of Conspiracy to Indict One of Felony; but here 'tis rather in nature of an Action upon the Case, and the Conspiracy alledged by way of aggravation. Fitz. N.B. 116. Et Adjournatur.

Anonymus

Anonymus.

A N Indictment was removed hither the last Term out of Middlesex, against Edward S. of Perjury, and he was named Edward all along in the Indictment unto the Conclusion, and then it was, & sic *prædictus Johannes commisit perjurium*. The Court was moved that this might be amended, and it was said, Indictments removed out of London have been amended by the Original, for they do not certify that, but only a Transcript; and a Jury have been resummoned to amend an Indictment found in this Court; and in this case, if by Examination of the Clerk of the Peace it appeared, the Indictment certified varied from the Original, it might be amended; sed Curia advisare vult.

Nota, If a Venire Facias be returned and not filed, a new one may be taken out.

Thomas Burgen's Case.

A N Indictment was brought against Thomas Burgen, for selling Ale in Black Pots not marked, and doth not conclude contra formam Statuti, and held to be good enough, for the Common-Law appoints just Measures; and tho' the Statute adds this circumstance, yet the Crime being at the Common-Law, the conclusion is as it ought to be.

Where a Statute makes an offence more Penal, (as that which deprives one that Steals the value of five Shillings, out of a dwelling house in the day time, of his Clergy,) yet the conclusion of an Indictment in that case is not contra formam Statuti.

Nota, Where one is sued by a name with an Alias, the Addition must ever be expressed after the first name.

Clerke and Cheney.

I N Trespass for breaking of his Close, the Defendant justifies by reason of a way from his House thorough the place where, *ulque altam viam regiam in parochia de D. vocat. London Road*, and Issue was joyned upon the way, and found for the Plaintiff; Vid. Hob. 189. It was moved in Arrest of Judgment, that there was no Issue joyned, for the incertainty of the terminus ad quem, whether this way should lead, and one that justifies for a way, if he alledges the place from whence, and to which, and that it leads over the place where, 'tis sufficient, tho' he mistake the other mean passages.

ges of it, and tho' this be the Defendants own Plea, yet he may take exceptions to it, not being certain enough to make an Issue.

Sed non allocatur, for in regard it is found he had a way over the place where, it is not material to the justification whether it leads, it being after a Verdict, when the right of the case is tried: And it is aided at last by the Statute of Oxford, 16 Car. And so Twysden said, it was the Opinion of all the Judges at Serjeants Inn, he putting the Case to them at Dinner.

Norris and Cuffail.

In an Action upon the Case the Plaintiff declared, That the Defendant in consideration of six pence paid in hand the 13 of Jan. 17 Car. and that the Plaintiff would pay him 20s. a Month, he promised to serve him in his Glass-house after the first Journy of Glas; and sets forth quod primum iter vitrij tunc prox. sequens aggregamentum prædictum fuit, 21 Feb. 17 Car. which was the year before, and that the Defendant did not come to serve him.

After Verdict for the Plaintiff it was moved in Arrest of Judgment, That the Plaintiff had not declared sufficiently of any Journy of Glas after the Agreement, but that alledged appears to be the year before. Et Adjornatur: This Case being moved again, Twysden said he had put it to the Judges at Serjeants Inn, and they were all of Opinion that it was well enough after a Verdict.

Heath *versus* Pryn.

In an Ejectione Firmæ of the Rectory of Westbourn in Chichester, upon Not Guilty pleaded, it appeared upon the Evidence that the Plaintiffs Title was as Presentee of the Grantee of the next Avoidance from the Lord Lumly, and Letters of Institution under the Seal of the Ordinary were produced; but by reason of the times (the Ordinary Parson and Patron being Sequestred,) no Induction followed thereupon, until the Kings Restauration; this Institution was 1645. Soon after the Defendant was placed in this Church by an Ordinance of Parliament, and hath enjoyed it ever since; and there was an Act of Parliament made, 12 Car. 2. which confirms Ministers in their Possessions of any Benefice with cure, tho' they came not in by Admission, Institution and Induction, but according to a form used in those times, in which Act there is also a Clause of Restitution of sequestred Ministers, to such Benefices as they had been seized of by taking the profits.

It was alledged on the Defendants side, that the Plaintiff proving nothing of a Presentation, the Institution could not be admitted as Evidence of it, especially in this case, where the Induction was so long after; to which the Court did incline. And then the Oath of the Grantee of the next Avoidance was offered; which was not admitted, altho' his Interest was executed by the Presentation. And it was said, that an Assignor might be sworn a Witness to the Assignment of a Lease, where there were no Covenants. It was also said, that the Plaintiff was not within the clause of Restitution, of the Act of 12 Car. because he had never seized by taking the Profits, which cannot be until Induction, according to Hare and Bicklers Case, in the Commentaries, quod sit concessum.

To which it was replied, That neither was the Defendant within the clause of Confirmation, because the Rectory in question was not a Benefice with cure, for there is belonging to it a perpetual Vicaridge Endowed, and the Vicar comes in by Admission, Institution and Induction, who performs Divine Service, pays the Synodals and Procurations, repairs the Chancel; and therefore it hath been adjudged, that such a Vicar shall have Arbores in Commensuro: And it was said that the Statute of 21 Hen. 8. against Pluralities, doth not extend to Rectories, where there are Vicaridges Endowed. And Linwood describes a Benefice without cure, cujus cura Vicariis perpetuo exercenda est: Otherwise, where the Vicar is Temporal and removable. And the difference is inter curam actualem & habitualem. And tis the Cure that the Rector hath, and so hath every Bishop in his Diocess; who when he gives Institution saith, accipe curam tuam et meam; but the Act only extends to the first.

It appeared also on the other side, That the Parson had come once or twice a year, Preached and Administered Sacraments; and that without the Vicars leave, and also paid firstfruits: Upon all this matter the Opinion of the Court was, That the Parson had a concurrent Cure with the Vicar, and resembled it to the case where there are two Incumbents in one Church, and coming in by Admission, Institution and Induction, the Vicar could not discharge him of the cure of Souls. But Donatives, which are conferred by Laymen are sine cura.

Note, The Plaintiffs Counsel would have denied the Act of 12 Car. to be an Act of Parliament, because they were not Summoned by the Kings Writ; but the Judges would not admit it to be questioned, and said, That all the Judges resolved, that the Act being made by King, Lords and Commons, they ought not now to pry into any defects of the Circumstance of calling them together; neither would they suffer a point to be stirred, where-
in

Vid. Hob. in the Estates of so many were concerned, / Notwithstanding all
 109. 33 H. this, the Jury found for the Plaintiff. It seemed by the Court in
 6. 19. this case, that Letters of Institution must be under the Episco-
 pal Seal; sed vide Cro. lib. 1. 249. Vid. postea.

The King against Burford.

HE was Indicted, for that he scandalose & con-
 temptuose propalavit & publicavit verba squentia, viz.
 That none of the Justices of Peace do understand the Statutes
 for the Excise, unless Mr. A. B. and he understands but little
 of them, no, nor many Parliament men do not understand
 them upon the reading of them. And it was moved to quash the
 Indictment, for that a man could not be Indicted for speaking of
 such words; and of that Opinion was the Court: But they said
 he might have been bound to his Good Behaviour.

Stones Case.

A Writ of Priviledge was prayed for Stone, an Attorney of
 the Court, who was a Copyholder of a Mannor, where the
 Custom was, for the Homage to chuse one of the Tenants to
 collect the Lords Rents for the year following; and they elected
 him. But it was said, that this might be taken to be parcel of
 his Tenure for the Lords, use to seize the Land for not executing
 of it; and his Priviledge ought not to deprive the Lord of the
 Service of his Tenant. In the Book of H. 6. The Archbishop of
 1 Cro. 422. York being bound by Tenure to Collect the Tenths, pleaded the
 Kings Letters Patents in discharge thereof, and they were disal-
 lowed; and tho' Attorneys have had their priviledge where they
 have been pressed Souldiers, as in Venables Case, 1 Cro. 8. Co. En-
 tries, 436. Springs Case, and 1 Cro. 283. and where by Custom it
 came to an Attorneys turn to be Constable, vid. Rolls 2. part 276.
 yet these are publick Services to which every one is bound; but
 Priviledges may be allowed to exempt particular persons, as
 the King may grant to one, that he shall not be of a Jury.

But the Court inclined to grant the Writ; for it did not appear
 that it was parcel of his Tenure, but rather imposed upon him by
 the Custom of the Mannor; and if Attorneys shall be discharged
 of the Service of the Common-wealth, à fortiori of any private
 Service. Vid. postea.

The

The King *versus* Webb.

In an Action brought against him for imbeisling of the Kings Goods, which was said in the Declaration to be in London; it was moved for the King, that the County might be changed: And the Court held the King might choose his County, and might waive that which he had seemed to have elected before, as he may waive his Demurrer and joyn Issue, & contra.

Perries Case.

In an Information of Forgery against him, being an Attorney of the Common Pleas, it was alledged, That he had framed a certain Writing in the form of a Release at Sherborn, and that he published and gave it in Evidence at Dorchester, and the Venue came out of Dorchester; whereas it was said, it ought to have come out of both places. To which it was answered, That the publishing, and not the framing, was the Crime. But notwithstanding it was held to be a Misdemeanor, and being in an Information it was not aided by any Statute. *Postea.*

Anonymus.

In Trover and Conversion, amongst other things the Plaintiff declared *de sex bovis*, instead of *bobus*. Upon Not guilty pleaded, and found for the Plaintiff, and entire Damages assessed.

It was moved in Arrest of Judgment, That the Jury ought to have given no Damages for *bovis*, being a word insensible, and entire Damages being given, it was naught for all. To which it was answered; That if the word be insensible, notwithstanding the Anglice, the Jury shall not be intended to have regarded it in the giving of Damages; and if it hath a signification, then it is well enough. And it was said, *bovis* was an old Latin word, and is found in Plautus, and 'tis *bobus* only by contraction. It was also said, That the Plaintiff brought this Action as Executor, and the Trover was said in the Testators time, which was not sufficient, tho' the Conversion was alledged in his own.

But the Court held neither of these Exceptions sufficient to Arrest Judgment.

Rumsey *versus* Rawson.

In Replevin, The Defendant Abowed for Damage Feasant.

The Plaintiff replies, That the Parson of such a Parish and all his Predecessors have had time out of mind Common in the place where, &c. belonging to his Glebe, and that the Beasts of the Plaintiff were Levant and Couchant upon the Glebe, and he put them into the Common by the Licence of the Parson.

The Defendant Traverses that they were Levant and Couchant, and found for the Plaintiff. And it was moved in Arrest of Judgment,

That the Plaintiff had not alledged matter sufficient to justify his Beasts going in the Common; for no other Beasts ought to be put in the Common, but those of the Tenant of the Land, to which it is appendant, or those which he takes to Compester his Land, Fitz. N. Br. 180. b. and that tho' the Common be claimed for a certain number.

And the Opinion of the Court was, That the Defendant might have demurred in this case. But after a Verdict the Court shall intend they were Beasts which the Parson procured to Compester his Land, and the right of the case is tryed, so aided by the Statute of Oxford. But they gave further time to shew cause. Postea.

Anonymus.

An Action was brought for these words, [Thou hast received Stolen Goods, and know they were Stolen: *Alire S.* Stole them, and thou wert partner with her.] For the first words the Court held them not Reasonable; for they might admit of a justifiable construction, as if the Goods were stolen. But the last were holden sufficient; for Partner with her must intend Partner in the Felony.

Skinner *versus* Gunter & al.

The case was moved again by Pomberron, and alledged in maintenance of the Action, that it was but in the nature of an Action upon the Case; for at the Common Law no Writ of conspiracy lay but for indicting one of a capital Crime; and that after an acquittal by Verdict. But since the Statute of 33 Edw. 1. de Conspiratoribus, Actions have been brought for conspiring to Indict one of Trespass, or to Sue one maliciously without cause of Action, as this case is, and so is Br. tit. Consp. pl. 2. and by F.N.B. 116. such

Such an Action in the nature of Conspiracy lies against one. And the Title of the Action in this Case is In placito transgr. super casum; and for these Reasons all the Court were of Opinion for the Plaintiff. Vid. Ante.

Braithwaites Case.

Braithwaite brought a Mandamus to the Mayor, Bailiffs and Burgesses of the Town of Northampton, to be restored to his place of Alderman there.

They make a Return, and in their Return set forth the Letters Patents of 16 Car. by which they were Incorporated; and power is given them of holding a Common Council, consisting of a Mayor, 2 Bailiffs and 48 Burgesses, and that the Mayor, Bailiffs, and such Burgesses as had been Mayors, (commonly called Aldermen) should have power upon just Cause to amove any Common Council Man from his place there; and then they set forth how Braithwaite was a Member of the Common Council, and had committed divers Offences, which they expressed in particular. Whereupon, the 18 of Dec. 17 Car. the Common Council assembled together, & summoniri procuraverunt the said Braithwaite; and he not coming to answer, was the same day amoved ab officio suo & loco suo in Communi Concilio per Majorem & Burgenses autoritate & secundum Chartam prædictam.

It was also set forth, That they had a command from the King and Council to amove him. Upon this Return there were four Exceptions taken.

First, That it did not appear that he was summoned; for it ought to have been, qui quidem Braithwaite postea summonitus fuit, and not summoniri procuraverunt. Sed non allocatur, for it was held clearly to be all one. Otherwise, if it had been quod procuraverunt J.S. eum summonire.

A Second Exception was, That their proceedings were too quick; for they amoved him the same day wherein he was summoned. Sed non allocatur, for it appearing he lived in the same Town, and refused to come to make his defence, they might immediately amove him.

A Third Exception was, That they had exceeded their power, which was only to amove him from his place in the Common Council, and they had amoved him from his Office. Sed non allocatur; for 'tis that wherein his Office consists, and indeed it was so averred in the Return.

But the main Exception was, for that they had not (as was alleged) pursued their Authority; for the Mayor, and such Burgesses who had been Mayors, have power given them to amove. And here the Amotion is said to be per Majorem & Burgenses, so that it

might be by the Mayor and Burgesses which never had been Mayors; and if in regard it was indefinite, it should be intended, that all the Burgesses were there, and it may be the Motion was by the Vote of such Burgesses as have not been Mayors, they being the greater number, and the others might dissent; as if the Mayor and Court of Aldermen in London were impowered to do a thing, and this is done per Cives Londini, it cannot be good. Sed non allocatur. For

First it shall be intended, That all the Burgesses were there, and that they all agreed in the moving of Braithwaite. And if the truth were, that the Burgesses which were qualified dissented, which must not be presumed, they might bring an Action upon the Case for the false Return: And further, to enforce the intendment as before it is said, to be per Majorem & Burgeses secundum Chartam: If it had been returned, that he was moved secundum Chartam generally, that had not been good, for there must be the manner returned, That the Court may adjudge whether the Authority be pursued.

Nota hoc.

It was further declared by Keeling, Rainsford and Moreton, That the King and Council might Distranchise any Member of a Corporation. And it was said by Rainsford, that the Walls of Northampton were ordered to be pulled down by the King and Council, a fortiori, an Alderman might be displaced upon just Cause; and here was no Exception to the Causes returned. But to this Twisden said nothing.

Anonymus.

Vid. 5 Co.
32.

UPON a Fieri facias to Levy a Debt recovered against an Executor, the Sheriff returned nulla bona; whereupon, after a Testatum, &c. a Writ was awarded to the Sheriff to enquire, &c. who returned that Goods to the value of the Debt, came to the Executors hands, & elongavit, vendidit, disposuit & ad proprium usum suum convertit. And Issue was taken by the Party, who came in upon a Scire facias, quod non elongavit, &c. and the Jury found for the Plaintiff. And it was moved by Saunders in Arrest of Judgment,

That there was no proper Issue, neither did it appear that there was any Devastavit; for the Executor may elogue and sell the Goods; therefore the Return and Issue ought to have been quod Devastavit.

Sed non allocatur; for this tantamounts; and the Presidents are so, as 'tis a good Warrant for a Capias in Wiehernam, when the Sheriff returns, that the Defendant in Replevin hath elougued the Beasts; so the Executor ought to be charged de bonis propriis upon his Return.

Wharton

Wharton and Brooke.

In an Action for Words, the Plaintiff declared, That he was and had been a long time a Midwife, and got divers Gains; and that the Defendant, to scandalize her in her Profession, said of her, She is an Ignorant Woman, and of small Practice, and very unfortunate in her way: There are few that she goes to, but lye desperately Ill, or die under her hands.

The Court held the Action maintainable.

But Twisden said, this hath been adjudged, Where one brought an Action, declaring he was a Schoolmistress, and taught Children to Write and Read, by which he got her Livelihood; and that the Defendant said of her, She was a Whore, and that J. S. kept her as his Whore: That to slander one in such a Profession was not maintainable without special Damage.

Sir Thomas Player (Chamberlain of London) and Jones.

Resolved by the Judges, That the By-Law in London, whereby the Number of Carts were restrained, was a good By-Law.

Walter and Chauner.

In Trespass the Defendant Justifies for Damage feasant. The Plaintiff in his Replication prescribes for Common, in the place where, &c. in this manner:

Until the Field was sown with Corn; and after it was sown, & post blada illa messa, until it was sown again. To which the Defendant Demurs.

And it was said, That this Prescription was unreasonable, viz. To have Common in Land sown. To which it was Answered and Resolved by the Court, That as the Prescription was laid, the Common was not claimed until after the Corn was reaped.

Nota, Upon a Fieri facias the Sheriff Returned, That he had taken Goods, and that they were rescued from him by certain Persons: And it was held to be no Return, and that he was to be Amerced.

Anonymus.

One recovers Debt, and then brings a new Action of Debt upon the Judgment: The Defendant pleads, Tender of the Money before the Action brought, & uncore prist, and the Plaintiff could have no Costs.

If the Defendant plead in Abatement of the Writ, and the Plaintiff Demurs, and 'tis Adjudged against the Defendant, it shall be only quod respondeat ulterius.

But if he alledge any thing in Abatement whereupon Issue is joyned, and tryed and found against the Defendant, there the Plaintiff shall have his Judgment to recover his Debt.

Skier and Atkinson.

In an Action upon the Statute of 8 H. 6. of Forcible Entry, the Secondary craved the direction of the Court before he could pay Costs; and they were doubtful in it, and rather inclined, that the Plaintiff was to have no Costs: But upon the view of Pilsford's Case in 10 Co. and the Books there cited, they resolved that he should have Treble Costs.

Crosse and Winter.

In an Action for these Words, Thou art a Thievish Rogue, and didst steal Plate from *Wadham Colledge in Oxford*.

The Defendant Justified, for that he did steal the Colledge Plate.

The Plaintiff Replied, De injuria sua propria. The Words were alleged to be spoken in London, and thither the Venire facias was awarded, and there was a Verdict for the Plaintiff.

Hob. 76. It was moved in Arrest of Judgment, That there was a Mistrial, for the Jury ought to have come out of Oxford; for the Issue is joyned upon the Matter in the Justification, and the Words are confessed: And with this agrees Ford and Brooke's Case in 3 Cro. 361. expressly.

But it was Resolved by the Court, That this was aided by the late Statute made at Oxford, being tried by a Jury of the proper County where the Action is laid, tho' the Issue upon pleading may arise out of another place and County.

Vid. Hob. 78. Note, An Act of Parliament was made to continue for Three years, and from thence until the end of the next Session of Parliament, and no longer. And it was Resolved, that this must be intended a Session, which commences after the Three years expired: for if a Session should be within the Three years, and continue for many years after, the Act would continue.

Note, It cannot be called a Session of Parliament unless the King passes an Act.

The

The King and Serjeant.

UPON a Certiorari to remove a Combition of Forcible Detainer by the Writ of two Justices, upon the Statute of 15 R. 2. The Record Returned was, *Quæstio est nobis Jane Wood Vid', quod quidem pacis Domini Regis perturbatores in domum mansional' existens liberum tenementum ipsius Jane manu forti ingressi sunt, &c.*

Exception was taken to it, because it was not actunc existens liberum tenementum ipsius Jane.

To which it was Answered, That altho' in an Indictment of Forcible Entry it must appear that the place was the Freehold of the party at the time of the Entry with force, because upon the finding of it a Restitution is to be awarded, and where 'tis generally existens liberum tenementum, it may be referred as well to the time of the Indictment, as to the Entry; yet here 'tis not material, because no Restitution is to be awarded, but the Malefactors being convicted by the Writ of the Justices, are to be fined and imprisoned: And the President in Mr. Dalton's Book of Justice of the Peace, fo. 356. makes no mention of whole Freehold at all: But however here existens liberum tenementum shall be referred to the Complainant, tho' there be not actunc, and of that Opinion were the Court: But Twissden was of Opinion, that it was not necessary to be alleged in this Case at all. Postea.

Sir Andrew Henley versus Dr. Burstall.

IN an Action upon the Case the Plaintiff declared, That he being a Justice of Peace, the Defendant had Indicted him for refusing of a Vagabond out of the Constables hands, who brought him before him, so that the Law could not be executed against him.

It was said, To Indict a man for such a Crime in the Execution of his Office, was Actionable; and it has been often resolved, That an Action would lye for Indicting a man of Barratry, and in the Book of Assize 13. for Indicting one for Trespass. And to this the Court did incline; but they would further Advise. Postea.

The King versus Ring.

Error to Reverse a Judgment in an Indictment of Forgery against Ring upon the Statute of 5 Eliz. cap. 4. for that he Scienter subdole & falso fabricavit quoddam falsum factum & scriptum Indentatum Barganiz & venditionis, which was said to be Enrolled, per quod Harrison Keymer & Henry Keymer did sell to

J.S.

J.S. such Lands ; and then sets forth the Indenture verbatim, & quod postea prædict' Ring prædict' Chartam esse falsam & contrafactam, vi & armis pronunciavit & publicavit; and this was ea intentione ad perturbandum statum, & titulum & interesse of Harrison and Henry Keymer, and their Heirs.

The first Error assigned was, That the Indictment was for Forgery of a Deed of Bargain and Sale; and the Indentures set forth were a Lease and Release. Also it did not appear in what Court it was Inrolled; and it must be Inrolled at one of the four Courts at Westminster, or before the Justices of the Peace at the Sessions to be a Bargain and Sale; and whereas the Indictment is for Forgery of a Deed, per quod Harrison and Henry Keymer did sell, only one of them was party to the Deed set forth. And it ought to have been in quo continetur that they did sell, and not, They did sell, whereas the Deed was forged, which as was said, is oppositum in objecto. And where it is that Sciens prædictam Chartam esse falsam vi & Armis pronunciavit & publicavit, it was said it ought to have been, Vi & armis prædictam Chartam pronunciavit & publicavit: And for this Vauxes Case in 4 Co. was cited, where it is Nich. nesciens prædictum potum cum veneno fore intoxicatum, sed fidem adhibens dictæ persuasioni dicti W. recepit & bibit; and because it was not prædictum venenum recepit & bibit, it was held insufficient; for Indictments must have precise certainty, fo. 44.

Another Exception was, That this Forgery was said to be ea intentione ad perturbandum statum titulum & interesse of them and their Heirs, and it did not appear that they had a Freehold; and the punishment inflicted by the Statute is more severe when the Forgery is to disturb the Freehold, than when it only concerns a Chattel: Also it ought to appear in whom the Freehold was at the time of the Forgery, as an Indictment of Forcible Entry upon the Statute of 8 H. 6. must express in whom the Freehold was at the time of the Force. Et Adjornatur.

Anonymus.

UPon Process against one, the Sheriff returned a Non est inventus, and an Affidavit was made, That the Defendant was one of the Sheriffs Bailiffs; and the Sheriff was amerced.

Anonymus.

IN Trover and Conversion against Baron and Feme, the Plaintiff declared, Quod ad usum proprium converterunt; which was naught, because it must only be ad usum of the Husband; and yet it may be converterunt if she were present; yet whatever she doth is the act of her Husband. 1 Cro.

Sir

Sir Andrew Henley and Dr. Burstall.

The Case was moved again, and spoken to in Arrest of Judgment, That no Action would lie for proceeding against a man by Indictment; and it would discourage all legal Prosecutions of Offences; and 4 Co. 14 b. was cited, where it is resolved, That no Action lies for Exhibiting of Articles to a Justice of the Peace against one, tho' the matter be false; nor for preferring a Scandalous Bill in the Star Chamber, concerning things whereof the Court had Jurisdiction. But an Action upon the Case, of Conspiracy, lies where Life or Member are brought in jeopardy by a malicious Indictment.

But notwithstanding the Court Resolved, That the Plaintiff should have Judgment. Tho' it was further alleged, That there was no Issue joined; for in the Pleading and Joining of the Issue the Defendants Christian Name was mistaken; but the Court would amend that, it being rightly named before in the Record. Ante.

The King and Serjent.

An Indictment of Forcible Entry and Detainer was preferred against Serjent; and the Jury found as to the Detainer with Force, *Billa vera*; but as to the Entry, *Ignoramus*: And it was moved to quash this Indictment, because they ought to have found all or none; and of that Opinion was the Court. Ante.

Rumsey and Rawson.

The Case was moved again by Mr. Solicitor; That the Plaintiff having Intituled the Parson to Common for 200 Sheep, levant and couchant, and that these Beasts were levant and couchant, and that he put them in by the Licence of the Parson. He ought to have shewn, That the Licence was by Deed, being to take a Profit in alieno solo; and the Statute (which gives remedy after Verdict, when he doth not say, *Hic in Curia prolar'*) doth not aid this: And 'tis necessary to plead a thing by Deed, whose nature requires it.

But to this it was Answered by Jones, That a Parol Licence was sufficient in this Case, being only to take the Profit *unica vice*, there passing no Estate in it: And the Plaintiff had Judgment. 2 Cro. 424

Pomfret versus Riccsoft.

In Covenant the Plaintiff declares, That the Defendant demised unto him a certain Messuage, excepting a piece of Ground whereupon a Pump stood; and grants, that he shall have the free use of the Pump during the term; and Covenants, that he should enjoy dimissa præmissa; and assigns a Breach, in that he suffered Antliam prædictam esse fractam & totaliter spoliatam. And to this the Defendant Demurs.

And it was said in Maintenance of the Action, That the Defendant having granted the free use of the Pump, was bound to do all things necessary to make his Grant effectual to the Plaintiff, or else he broke his Covenant of Enjoying; and if the Plaintiff should come to Repair it he would be a Trespasser: And of this Opinion was Keeling. But Twisden conceived, That an Action of Covenant would not lye, there being no express Covenant to Repair it: Otherwise if he had taken away the Pump; and here he might bring an Action upon the Case, because he lost the use of it; and they Two being only in Court, it was Adjourned. Postea.

Anonymus.

A Presentment was made in a Leet for Erecting of a Glass-House, which was said to be ad magnum nocumentum, per juratores Jurat' pro Dom' Rege, & Dom' Manerii, & tenentibus. It was said, A Man ought not to be punished for erecting of any thing necessary to the exercise of his lawful Trade; but it was Answered, that this ought to be in convenient places, where it may not be a Nuisance. For Twisden said, He had known an Information Adjudged against one for Erecting of a Brew-House near Serjeants-Inn: But the other Justices doubted, and agreed, that it was unlawful only to Erect such things near the King's Palace.

But this Presentment was clearly ill, because it was not ad commune nocumentum: And it was said further, That the Leet was the King's Court, and therefore it ought not to be Jur' pro Dom' Rege, & Dom' Manerii, & tenentibus. But the Court held it Surplusage for tenentibus, and good for the King and the Lord of the Mannor: For Leets are granted to the Lords as derived out of the Tourn, for the ease of the Residents within its Jurisdiction.

2 Cro. 382.

More

More versus Lewis.

In an Assumpsit the Plaintiff declares upon Two Promises; One was, That in Consideration that he had done him multum & gratissimum servitium, the Defendant promised to pay him Ten Pounds a year.

The Consideration of the other was, That he had done him multa beneficia.

Upon Non Assumpsit pleaded, and found for the Plaintiff, as to both the Promises and entire Damages given, it was moved in Arrest of Judgment, that neither of these Considerations were sufficient, especially the last; for there ought to have been some Service particularly expressed.

To which it was Answered, That this being after a Verdict, the Court must intend, that the Plaintiff gave in Evidence something that he did, which was a Consideration sufficient, otherwise the Jury would have given no Damages. And a Case was cited in Hutton's Rep. 84. where the Plaintiff in an Assumpsit declared, That in Consideration that she had served the Defendant and his Wife, and done them loyal Service, that he would give her 13 s. 4 d. And a Verdict being found for her, she had Judgment. Sed nota, In the Book nothing was said to be moved in Arrest of Judgment, but the Insufficiency of the Consideration, in respect that it was executed and laid to be done at the Request of the Defendant.

But the Court held clearly, that nothing being particularly expressed in the Consideration of the Second Promise, in this case it was merely void, and entire Damages being given, the Plaintiff could not have his Judgment. And thereupon Judgment was Entered, Quod querens nihil capiat per Billam.

Gregory versus Eads.

Error to Reverse a Judgment given in the Court at Warwick, in an Assumpsit, where the Plaintiff declared of Three Promises, whereof one was found for the Plaintiff, and as to the other two, that the Defendant Non Assumpsit; and Judgment was given for the Plaintiff for that which was found for him; but no Judgment was given as to the other, that the Plaintiff should be amerced pro falso clamore, or quod Defendens eat inde sine die. And it was assigned for Error, that this Judgment was defective, and ought to be Reversed. To which it was answered, That the Judgment ought to stand for so much as was good; and 2 Cro. Vid. con. 343. was cited, where in an Action for Words spoken at divers times the Jury found the Defendant guilty as to all, and gave several Damages; whereupon there was Judgment, and a Writ of

of Error brought and assigned, in that the Words spoken at one of the times were not Actionable. Which being agreed, the Court Resolved, that Judgment should be reversed only quoad them, and should stand for the residue; for *utile per inutile non vitiatur*. And Slocomb's Case (1 Cro. 319.) where a Writ of Error was brought to Reverse a Judgment, given in an Action for Words, and assigned, in that it was Entred, *Concessum fuit quod querens nihil capiat, &c.* whereas it should have been *Consideratum*: Yet because the Words were Insufficient, the Court (tho' they held the manner of the Entry erroneous) ordered Judgment to be given, *Quod querens nihil capiat per Billam. Et Adjornatur. Postea.*

Note, It was said by Serjeant Maynard, That after all the Evidence given in an Information, the Kings Council may, without the parties Consent, withdraw a Juror and try it over again: And so he said it was done by Hobart, Attorney General, 5 H. 7. and in the Exchequer by Noy, in King Charles the first's time.

Barkly versus Paine.

In an Assumpsit in an Inferiour Court, the Consideration was, That the Plaintiff should solicit a Cause in Chancery.

The Court Reverseth the Judgment for want of Jurisdiction. It had also another fault, for it was *Defendens in misericordia & capiatur*.

Anonymus.

It was moved to quash a Return of Rescous, for that it was *Vi & armis in Ballivum meum affraiam fecerunt & e custodia mea adtunc & ibid' rescusserunt*, and not *Vi & armis rescusserunt*. Sed non allocatur; for by reason of *adtunc & ibidem*, *vi & armis* mentioned at first shall be applied to all.

Hanway versus Merrey.

The Case was, The Defendant had Covenanted to pay the Plaintiff a Sum of Money the 24th of June next; whereupon the Plaintiff takes out a Latitat, Teste 3 Maii, Returnable the last day of Trinity Term following, and Arrested the Defendant upon it: Which being made appear to the Court, they discharged the Arrest. For tho' tis allowed a man may take out a Latitat before the Money is due; Yet the party must not be Arrested upon it before: And this differs from an Original, which if it bears Teste before the Money be due, it is abateable; but the Latitat is only to bring him in custodia, that the Plaintiff may declare against him by Bill, and after that the proceedings upon the Latitat cease.

Note,

Note, By the Custom of London, the Debtor may be Arrested before the Money is due, to make him find Sureties. Hob. 86.
2 Cro. 667.

It was also moved, That the Defendant might have Costs, being put to the charge of motions to be discharged; but the Court would grant none, it being but for taking out of the Process of the Court.

Stones Case.

The Case being moved again, The Court (absente Moreton, & dubitante Rainsford) granted a Writ of Privilege altho' he were obliged by his Tenure to be the Lords Reeve, for the Privilege is presumed more Antient than the Creation of the Tenure, or at least shall be preferred, in as much as it concerns the Administration of Justice. And Keeling said, An Attorney could not be amerced for not doing Suit to his Lords Court, at such time as his attendance is required at Westminster. Ante.

Sir Robert Cotton *versus* Daintry.

In Trover and Conversion for Goods and Money assigned by Commissioners of Bankrupt, upon Not guilty pleaded, the Question of fact before the Jury was; Whether Sir A. B. (whose the Goods were) was a Bankrupt?

The Plaintiff proved, That he had Silk and other Merchandise in his Warehouse to a very great value; and that upon the Credit of them he took up divers Sums of Money, and afterwards sold them, but could not prove that they were brought in after the Debts contracted, or that he had Exported any thing at any time after, or a good while before.

To this the Court delivered their Opinions, That the selling of such Merchandise, if they were but the Effects of his former Trading, (for he had been a Turkey Merchant) which he could not put off immediately upon his ceasing to Trade, could not make him a Trader; for the Statute only extends to those that Live by Buying and Selling. It was also proved, That he had a 16th part in a Coalship, which at present Traded to Newcastle, but brought no present profit to the Owners, she being much in Debt for Repairs. It was said to be resolved in one Crashaws Case, That the having a part in a Ship did not make a man a Trader; but that was a Merchant Ship, which the Owners let out to Freight; but the Owners freighted this Ship themselves, and were to have an account of profit and loss, and that if an Owner refused to freight he was Compellable. But in regard it could not be proved that Sir A. B. had freighted, or that he had received any account of profit, Keeling and Twissden were of Opinion that it did not make

make him a Trader. Rainsford and Moreton doubted. Wherefore it was offered the Plaintiffs Counsel to have found it Specially; but they declined it, and the Jury found a general Verdict for the Plaintiff.

The day after motion was made for a new Tryal, Affidavit being made, that the Foreman of the Jury was Brother in Law to one of the Creditors of Sir A. B. The Court was also informed, that the Plaintiff after the Verdict had paid the Jury 4 l. a man, whereas the Rule of Court is, that they coming but out of Hertsfordshire, should have but 20 s. a man.

Moreton and Rainsford held neither of these Reasons sufficient. For the first, it was their own Laches that they did not challenge upon it. For the other, they thought the breach of the Rules of Court ought to be punished, but did not think fit to set aside the Verdict for it.

Twisden for the last reason held a new Tryal was to be granted, and that it was fit to be made an Example to other Juries: For if the Parties may give what they will, it is to be presumed, the ability of one or other will much incline the Jury to find for him, from whom they may expect the greatest reward.

Keeling held both reasons sufficient for a new Tryal; which could not be, in regard the Court was divided; whereupon Judgment was entered for the Plaintiff, and Execution taken out, and a Writ of Error was brought, which was sealed about an hour before Execution executed. Whereupon it was moved, That the Sheriff might bring the Money into the Court, for that the Writ of Error was a Superseas; for though the Sheriff shall not be in Contempt, if he makes Execution after the Writ, if no Superseas be sued out, for that he had no notice; yet the Writ of Error immediately upon the sealing forecloses the Court, so that the Execution made after is to be undone; of which Opinion was the Court, and Ordered the Money to be brought in, and not delivered to the Plaintiff.

Mr. Justice Moreton's Case.

HE brought Debt as Executor upon the 2d of Edw. 6. for not setting forth of Cythes due to the Testator. Upon non debet pleaded, and a Verdict for him, it was moved in Arrest of Judgment, That this being a forfeiture given by the Statute for a Tort done to the Testator, it could not be brought by the Executor. To which it was answered, That this Action was maintainable within the equity of the Statute of the 4th of Edw. 3. that gives the Executor Trespass de bonis asportatis in vita testatoris. So an Ejectione firmæ lies upon an Ejectment done to the Testator and Trover and Conversion, where the Conversion was in the time of

of the Testator. 1 Cro. adjudged, that an Executor may bring an Action upon the Case against the Sheriff, for an Escape upon Mesne Process suffered in his Testator's life time. And the Court were clear of Opinion for the Plaintiff, and said it had been formerly resolved so in the Exchequer Chamber.

The Lady Wortley *versus* Holt.

A Writ of Error was brought to Reverse a Judgment given in Dower in the Common-Pleas, which being affirmed in this Court, a Writ of Error was brought returnable in Parliament, which was discontinued by the Prorogation of the Parliament.

Another Writ of Error was brought Terme the last day of the Session of Parliament, viz. 1 March. Returnable 19 November, the day to which it was Prorogued.

The Court resolved, That though the first Writ of Error was not discontinued by any Act of the Party, yet this second should be no Superseas. First, It was doubted, whether this Writ of Error bearing Terme the last day of the Session was not determined by the Prorogation? And it was held clearly, That A Writ of Error returnable ad proximum Parliamentum could not be good: But here the Parliament was Prorogued to a day certain. But however all the Court held, That in regard of the length of time in the Return it should be no Superseas. And Twisden cited a Case between Limmerie and Limmerie, where a Writ of Error was brought Terme 28 Nov. Returnable 28 Nov. proxime sequent' in Parliament, and resolved to be no Superseas, by rea- 2 Cro. 341: son of the length of the Return.

Anonymus.

A Information was exhibited against A. B. for causing to be framed, printed and published a Scandalous Libel, Entituled, &c. thereby scandalizing of one C. D. Upon Not guilty pleaded, It appeared upon the Evidence, that after the discovery of the Libel, there were Warrants from the Lord Arlington, Principal Secretary of State, to search the Lodgings of the Defendant, who was suspected to be the contriver of it, where were found two of these Libels printed.

The Opinion of the Court was, That this was no Crime within the Information, though he gave no account how they came there; and the having of a Libel and not delivering of it 5 Co. 125. B. to a Magistrate, was only punishable in the Sarchamber, unless the Party maliciously published it.

Anonymus

Anonymus.

Hob. 192,
300,301.

If the Jury upon an Issue joyned in a Prohibition upon a Modus Decimandi find a different Modus, yet the Defendant shall not have a Consultation, for it appears he ought not to Sue for Cythes in Specie, there being a Modus found.

Termino Sanctæ Trinitatis, Anno 21 Car. II.

In Banco Regis.

Jurado *versus* Gregory.

The Case was this, There was a Contract at Malaga concerning the Lading of a Ship, and for breach of this which was laid to upon be the Sea, (viz.) That he would not receive 40 Butts of Wine into the Ship according to the Agreement, there was a Libel in a foreign Admiralty, and Sentence that the Wine should be received into the Ship; which being refused, another Libel was commenced in the Admiralty here in England, Reciting the former Sentence and charging the Defendant with the breach of it; and a Prohibition was prayed, because it appears the Contract was made upon the Land.

Vid. Latch.
234

Against which it was objected by Finch Solicitor, that where Sentence is obtained in a foreign Admiralty, one may Libel for Execution thereof here, because all the Courts of Admiralty in Europe are governed by the Civil Law, and are to be assistant one to another, though the matter were not Originally determinable in our Court of Admiralty; and for this he cited a Judgment, 5 Jac. Rolls Tit. Courts, Sect. admiralty. And this the Court agreed. But here was no compleat Sentence in the foreign Admiralty, but only an Award, that the Wine should be received; and now for breach thereof he Sues here, which is in the nature of an Original Suit, and to have Execution of the Sentence; and this ought not to be, though the breach were at Sea, it being of a Contract made upon the Land, wherefore they Granted a Prohibition.

The King Grants bona & catalla felonum, the Grantee shall not have Felons Debts, nor bona & catalla Felonum de se.

Anonymus.

Anonymus.

A Conviction was certified of one, for carrying of a Gun, not being qualified according to the Statute, where the words in the Statute are, Upon due Examination and proof before a Justice of the Peace.

The Court resolved, That that was not intended by Jury, but by Witnesses; and no Writ of Error lies upon such Conviction.

And an Exception was taken, because it was before such an one Justice of the Peace, without adding *Nec non ad diversas Felonias, Transgressiones, &c. audiend assign'*. And the Court agreed, so it ought to be in Returns upon Certiorari's, to remove Indictments taken at Sessions. But otherwise of Convictions of this nature, for 'tis known to the Court, that the Statute gives them Authority in this Case.

The King *versus* Benson.

In an Information against him for Extortion, an Issue was joyned the day the Jury were returned, and the King sent a Writing under his Sign manual, to Sir Thomas Fanshaw Clerk of the Crown, to enter a Cesser of Prosecution: And Palmer Attorney General affirmed, that the King might stay proceedings; yet notwithstanding, the Court proceeded to swear the Jury, and said they were not to delay for the great or little Seal; whereupon the Attorney entered a *Noli prosequi*.

Anonymus:

Trover against Baron and Feme, and laid quod ad usum proprium converterunt; and it was alledged, proprium might be applied only to the Husband; so also if it had been ad usum suum. But the Court held neither had been good; so it was prayed that Judgment might be entered, quod Querens nihil capiat per billam: for if it had been quod Defendens eat inde sine die, the Plaintiff could not have brought an Action de novo.

Note, A man is Outlawed in Middlesex, A Capias utlagatum may be sued out against him into any other County, without a Testatum.

¶

Anonymus.

Anonymus.

In Trespass, the Defendant justifies by reason of Common in the place where, for Cattel Levant and Couchant upon his Land, and doth not aver the Beasts were Levant and Couchant. This is aided after a Verdict.

A Judgment in Debt is had in the Kings Bench, and a Writ of Error is brought; it still remains a Record of the Kings Bench; and an Action of Debt may be brought upon the Judgment.

In a Writ of Error, if the Defendant dyed, the Writ is not abated: Otherwise if the Plaintiff die. And the Secondary informed the Court of a Case between Sir H. Thyn and Corie, where a Scire facias ad audiend. Errores went against the Executors, when the Defendant in the Writ of Error dyed.

Note, The Exchequer Chamber doth not award a Scire facias ad audiend. Errores; but notice is given to the Parties concerned.

Skirr and Sikes.

In Trespass upon the Stat. of 8 H. 6. the Plaintiff had Judgment. It was moved, whether a Writ of Error would lie of this into the Exchequer Chamber. For though Trespass be one of the seven Cases where the Statute gives it; yet it might intend Common Trespasses only, and not where the Action is founded upon a Statute; as Actio de Scandalis Magnatum is not within the Statute. And the Court would advise.

Cabell and Vaughan.

5 Co. Whelp-
dales Case,
He cannot
plead non
est factum

In an Action of Debt upon a Bond against one, and it appears another was jointly bound with him; wherefore the Defendant Demurs. But it was adjudged for the Plaintiff; for the Defendant cannot Demur in such case, unless the other Obligor be averred to be living, and also that he sealed and delivered the Bond, 3 Cro. 494, 544. Ascue and Hollingworth's Case, 28 H. 6. 3. And if one be bound to two, one Obligor cannot sue unless he averres the other is dead. In B. R. 1651, 1068. Levit & Staneforth.

Perries

Perries Case.

In an Information of Forgery against him, there was a Mistrial. And it was moved, That this was aided by the Statute of 21 Jac. the general Purview whereof is extended to any Action, Suit, Bill or Plaintiff. Then there is a Proviso, which excepts Indictments and Informations upon Penal Statutes; and this being an Information at Common Law, was not within the Proviso; and it may be taken within the word Suit, for it is *Secta Domini Regis*.

But the Court held it not remedied, either by the words or intention of the Act. *Vid. Ante*.

Nokes and Stokes *versus* . . .

They two brought an Action of Debt upon a Bond. The Defendant pleads the Release of one of the Plaintiffs. They pray Oyer of the Release, which was of all Actions, Suits, &c. that he had against the Defendant upon his own account; and pleads that this Bond was not upon his own account; and upon this Issue is taken, and found for the Plaintiff.

Now it was moved in Arrest of Judgment, That this Issue was frivolous. And upon the whole matter it appears, that the Plaintiffs have no cause of Action; for the Release of one Obligor discharges the Bond; and it must be upon his own account.

But the Court Seriatim delivered their Opinions for the Plaintiffs; for he might take this Bond as a security of a Debt, with which he was intrusted for another. And the truth of the case upon the Evidence was, That the Defendant being charged with the payment of divers Legacies to Strangers, was requested by one of the Plaintiffs to enter into Bond to him, and the other Plaintiff (who afterwards made the Release) that should be Conditioned for the payment of the Money Bequeathed to the Obligees, to the use of the Strangers, which not being done, the Defendant was Arrested at the Suit of the Plaintiffs; this being made known to the Plaintiff, who was absent at the taking of the Bond, and knowing nothing of the Suit, was contented to Release all Actions he had against the Defendant upon his own account.

King *versus* Atkins.

Debt upon a Bond of 2000 l. The Defendant demands Oyer of the Condition, which was, That whereas the Plaintiff was bound with the Defendant to the King, that the Defendant should give a true account of such Moneys, as he should receive

for the Excise and Chimney Money, And that the Defendant should save him harmless from all Payments, or Suits upon that Bond; and pleads that no Suits, Process or Execution was against the Plaintiff upon that Bond, & insint he saved him harmless. The Plaintiff replies a Scire facias issued against him out of the Exchequer upon the Bond, and that he was forced to retain an Attorney, and that he paid 1 s. for his Appearance. To this the Defendant Demurs.

Because he did not alledge that he gave him notice. And this was said not to be like Broughtons Case, 5 Co. For there the Defendant knew the Money was to be paid at the day, and it was to save him harmless from the single thing; but here from a great many, so that it was requisite he should have notice. Where the Mesne is bound to acquit the Tenant, the Tenant shall not recover Damages, unless he gives the Mesne notice that he is distrained, so that he may Replevy the Beasts.

But it was said, That no notice ought to be given, where the thing is an Act of a third person, as to pay Money when J. S. comes into England.

To which it was answered, That did not lie in the Conscience of either Party; but this was in the notice of the Obligor. But that which seemed most against the Demurrer in this case was, That the Defendant having pleaded no Process, &c. he takes upon him the knowledge of it: And if in the Replication the Plaintiff had alledged notice, and the Defendant had traversed it; it would have been a departure; and the Court advised until the next Term. Postea.

Welsh versus Bell.

TRESPASS quare clausum fregit, and taking of two Horses out of his Cart: The Defendant justifies the taking of them, as a Distress for Rent due to him. And to this the Plaintiff Demurs.

First, He could not sever the Horses, but ought to have distressed Cart and all, according to the Book of 20 Edw. 4. 3. Distress of a Cart loaden with Corn, and four Horses in it; adjudged not excessive, because he could not sever the Horses. And in 3 Cro. 7. a Distress is taken between Distress for Rent, and Damage Feasant to this purpose. And the common ground is, that a Distress must be taken so as it may be returned in the same plight, 1 Inst. 47. a.

Secondly, It appeared also in the Declaration, That there was a Servant of the Plaintiffs in the Cart, by reason of which it was alledged, that the Cart and Horses were privileged; for a Horse cannot be distrained upon which a Man is Riding, 3 Cro. 549, 596. Ed Adjournatur.

Twisden

Twisden cited a Case adjudged before Rolls Chief Justice in Trespas, for taking of his Trunk. The Case was, the Defendant distrained it for Rent, and being informed that there were things of value in it, he caused it to be corded to prevent damage. And for that he was adjudged a Trespasser ab initio.

Anonymus.

An Action on the Case was brought against the Defendant, for taking and keeping of the Plaintiffs Wife from him: And upon Issue joined the Court was moved to defer the Trial, the Case being that the Wife was Daughter of the Defendant, and taken from him by the Plaintiff without his Consent, and as the Plaintiff affirmed, Married to him. Now this Marriage was questioned in the Court Christian: And the Court thought it reasonable that, the Trial should be delayed until the Marriage was determined there. But they were informed on the other side, that the Court were ready to give Sentence, That the Marriage was good, and the Defendant had Appealed. Wherefore they thought fit that the Trial of the Cause should proceed.

The King *versus* Nelson.

An Order for the keeping of a Bastard Child being removed by Certiorari, it was moved to have it quashed, because it was ad Sessionem pacis in Com' præd', and doth not say, Tent' pro Com' prædict'.

Sed non allocatur: For such strictness is not required in an Order. But Twisden said, it ought to be so in an Indictment.

It was further alledged, that it ought to appear, That the Child was likely to be chargeable to the Parish; which was agreed. But that was sufficiently set forth in the Order; for upon Reading of it, it appeared, that he was ordered to pay such Charges as the Parish had been at.

Wherefore the Court confirmed the Order, and awarded, that he should pay such Costs as the Parish had been at for Contesting of it; as was done formerly in one Haslefoots Case: And besides, the Court Committed Nelson.

Anonymus.

Debt upon a Bond, Conditioned to perform Covenants: If the Defendant pleads performance without demanding Oyer of the Indenture it is a good cause of Demurrer.

Anonymus.

Anonymus.

In Covenant the Plaintiff declares, That he let the Defendant a House, and that he Covenanted to Repair it. The Defendant pleads, That it was sufficiently Repaired before the Action brought.

The Plaintiff Demurs, because he doth not plead, That he Repaired it; for it may be the Plaintiff himself did it.

Keeling and Raynsford inclined against the Demurrer; because if it were Repaired, be it by any Body, the Plaintiff hath no Damage nor cause of Action.

But Twisden doubted, and afterwards the parties waived their Demurrer and went to Issue.

Anonymus.

An Information was brought upon the Statute of Usury, for taking the 30th of May, in the 20th year of the King, 42 s. pro deferendo 25 l. for three Quarters of a year, (viz.) from the 30th of August, Anno 19. Upon Not Guilty pleaded, it was found for the King, and moved in Arrest of Judgment, that this was not within the Statute, which extends only where there is an Usurious Contract in the beginning, and there it makes the Security void: Or if there be an Agreement after the Money lent for Forbearance, upon Consideration of paying more than the Statute allows for Interest, which is punishable in an Indictment or Information; but the Money is not lost: But in this case, the time of Forbearance was past, and the party might give what he pleased in recompence for it, there being no precedent Agreement to enforce him to it.

Sed non allocatur: For the Court said, They would expound the Statute strictly; and if liberty were allowed in this case, the Brokers might oppress the People exceedingly by detaining the Pawn, unless the party would give them what they would please to demand for the time after failure of payment.

Wingate and Stanton, the Bail of William Stanton.

It was Resolved, That where a Scire facias goes against the Bail in this Court, and two Nichils are Returned, and Judgment is had thereupon, no Writ of Error can be brought in the Exchequer Chamber, but in the Parliament only.

Also, after such a Return it cannot be Assigned for Error, that there was no Capias awarded against the Principal. But in that case the
Bail

Bail is releivable only by Audita querela. But if the Sheriff Returns a Scire feci, they may plead it. Fitz. N.B. 104. l.

Nota, A man cannot Release a Debt by his Will.

The King *versus* Saunders.

Saunders was Convicted before two Justices upon the Statute of 32 H.8. cap.6. for carrying of a Gun. Which being removed by Certiorari, was quashed, because it was coram nobis Justiciariis Domini Regis ad pacem suam conservand', wanting the word assignatis.

Anonymus.

An Indictment was quashed, because it was Justiciarii ad pacem conservand' assign', and not ad pacem Domini Regis; neither would ad pacem publicam serve. And for another Reason, because it was ad Sessionem in Com'tent', and not pro Com': But if it were ad Sessionem in a Borough Incorporated, it were good, tho' it were not pro Burgo.

Maleverer and Redshaw.

Debt upon a Sheriffs Bond; The Defendant pleads, that there was an Attachment issued out of Chancery against him, Returnable Octab' Sanctæ Trin'; and the Condition of this Bond was, that he should appear Crast. Sanctæ Trin. and so he pleads the Statute of 23 H.6. against it; for that it was taken for Easimento & favore.

The Plaintiff Replies, That the Writ was Returnable Crastino Sanctæ Trin. And Traverses, That the Bond was taken for ease and favour. To which the Defendant demurs, supposing that he should have Traversed, that the Writ was Returnable Octab. Sanctæ Trin. which is the Matter of the Defendants Bar, and the other is but the consequence of Conclusion. Et Adjornatur.

Vid. 11 Co.
10. a.

Gregory *versus* Eades.

Error to Reverse a Judgment given in an Inferiour Court, where an Assumpsit was brought, and the Plaintiff declared upon three several Promises, and the Jury found two for him, and the other non Assumpsit: And Judgment was given for the two, that he should recover; but no Judgment for the third, that he should be amerced pro falso clamore, or that the Defendant eat inde find die. And for this Cause Error was assigned.

But Powys Argued for the Defendant in the Writ of Error, that the Judgment should be affirmed as to the Two Promises, for which

it

it was perfect, and cited Miles and Jacob's Case in Hob. 6. and 2 Cro. 343. where an Action was brought for Words, declared to be spoken at several times, and several Damages given, and Judgment, and a Writ of Error brought, and assigned for Error, that the Words spoken at one of the times were not Actionable; which tho' they were not, yet the Judgment was Reversed quoad them only.

But the Court said, That it was not like this Case, for here the Judgment was altogether Imperfect; and so were inclined to Reverse it; but gave further time. Ante.

Anonymus.

In Replevin the Defendant avows for Rent Arrear. Upon non concessit pleaded, the Jury find for the Avowant. The New Statute says, That the Defendant may pray that the Jury should enquire what Rent is arrear, and that he shall have Judgment for so much as they find.

Now the Court was moved, that this might be supplied by a Writ of Enquiry; as if they omit to enquire of the four Points in a Quare Impedit, it may be so supplied, 10 Co. Cheney's Case. But the Court held this could not be so; for the Defendant loseth the advantage of it by not praying of it: As where a Tale is granted, if it be not Entred ad requisitionem Querentis, or Defendentis, it is not good; wherefore he was bid to take his Judgment, quod returnum habeat averiorum, at the Common Law.

Anonymus.

Four Executors, two of them are under Age; quære, Whether they shall all sue by Attorney.

Note, An Infant may bring an Action against his Guardian, which pleads any thing to his prejudice: Not so of an Attorney.

Wells versus Wells.

In an Assumpsit the Plaintiff declares as Administratrix to her Husband, who in his Life-time agreed with the Defendant, That they should be Partners in making of Bricks for J. S. and after his Death the Defendant promised the Plaintiff in Consideration, That she had promised him to relinquish her Interest in the Partnership, that he would pay her so much Money as her Husband had been out about the Brick. And upon non Assumpsit pleaded it was found for the Plaintiff.

It

It was moved in Arrest of Judgment, that here was no Consideration; for the Plaintiff had no interest in the Partnership, which being joyn't, must survive to the Defendant; and he ought to have shewn how he relinquished her Interest.

But the Court held it a good Consideration; for it may be there were Covenants, that there should be no Survivorship; (and the Court will intend, after a Verdict, that there were) which tho' they do not sever the joyn't Interest in Law, yet they give Remedy in Equity, which to debar her self of is a good Consideration, and being laid by way of Reciprocal Promise, there needs no averment of per formance.

Termino Sancti Michaelis, Anno 21 Car. II. In Banco Regis.

William Bate's Case.

A Prohibition was prayed to the Commissary of the Archdeacon of Richmond, to stay a Suit against Bates a Schoolmaster; who, as it was alledged, taught School without the Bishops Licence; and it was granted, because they endeavoured to turn him out; whereas they could only Censure him, he coming in by the Presentation of the Founder.

In a Feoffment of Tythes and Lands, where there is no Livery; if they do adjudge the Tythes to pass, notwithstanding there is no Livery, a Prohibition will lye.

In Debt upon a Lease at Will, there must be an Averment that the Lessee occupied the Lands. But it is otherwise upon a Lease for Years.

Anonymus.

The Court was moved to grant an Attachment against a Justice of the Peace, who upon Complaint refused to come and view a Force: But the Court denied it, and directed the party to bring an Action of Debt for the 100 l. forfeiture given by the Statute in that case.

It was said by the Court, That in an Execution upon a Statute Merchant there is no need of a Liberate, as there is upon a Statute Staple: And in the Case of a Statute Staple, the Consuee can bring

no Ejectment before the Liberate; neither can the Sheriff upon the Liberate turn the Terre-Tenant out of possession, as he is to do upon an Habere facias possessionem.

Dier versus East.

AN Action was brought against the Defendant upon an Indeb' pro diversis Mercimoniis venditis & deliberatis to the Wife, to the use of her Husband, it being for her wearing Apparel. And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this Declaration being laid, That the Sale was to the Wife, tho' it was to the use of the Husband, it was not good; as if it had been sold to the Servant of the Plaintiff.

Nevertheless the Court were of Opinion, That it being for her Apparel, and that suitable to her Degree, the Husband was to pay for it: as had been Resolved in this King's time, in Scot and Manby's Case in the Exchequer Chamber, and that the Declaration was well enough.

Anonymus.

The Defendant in an Action of Debt upon a Bond, sued out an Injunction in Chancery; where after the Case had depended for two years, the Court was moved, that the Plaintiff might accept of his Principal, Interest and Charges.

The Court said, If the Defendant comes before Plea pleaded, and makes such a proffer, they are ex debito Justitiæ to allow it: But now he having delayed the Plaintiff in Chancery two years, it was in their discretion. And the other three, against the Opinion of Keeling, thought fit to deny it.

Clarke versus Phillips & al'.

UPON the Trial in an Ejectment, the Title of the Plaintiff's Lessor appeared to be by a Remainder limited to him for Life upon divers other Estates, and that there was a Fine levied, and Proclamations passed; but he, within the five years after his Title accrued, sent two persons to deliver Declarations upon the Land, as the course is upon Ejectments brought.

The Court Resolved, that this was no Entry or Claim to avoid the Fine, he having given no express Authority to that purpose; and the Confession of Lease, Entry and Ouster, by the Defendant, should not prejudice him in this respect. In this Case Keeling and Twissden were of different Opinions in this Point, (Viz.) If he that hath power of Revocation over Lands, &c. makes a Lease for Life, whether it suspends the Power only, as a Lease for years would do, or extinguisheth it as a Feoffment?

The

The King *versus* Monk & al.

In an Information for a Riot, it was concluded contra formam Statuti 13 H. 4. which appoints Justices of the Peace, upon complaint of Riots, to view and Recorde them. And after Verdict it was moved in Arrest of Judgment, that this Information was not good, it being grounded upon this Statute, which only mentions Riots, and appoints them to be punished in the manner there expressed.

But the Chief Justice Keeling was of Opinion, that it being a Crime at the Common Law, and mentioned in this Statute, the Information was well concluded: But the other Justices inclined to the contrary.

Anonymus.

Debt upon a Bond Conditioned to perform Covenants in an Indenture. The Defendant pleaded, That there were no Covenants contained in the Indenture on his part to be performed. The Plaintiff demands Oyer of the Indenture, which is Entered verbatim, and then Demurs; which he could not well do before the Entry of it, whereby it becomes part of the Bar; so the cause of the Demurrer appears.

Then it was alledged by Saunders, (whose Hand was to the Plea) That the Plaintiff could not have Judgment, because he had set forth no Breach. But the Court was much offended with him: For they held the Plea in Bar meerly for delay, and advised against the Statute of Westm. 1.

Robinson *versus* Pulford.

In an Assumpsit the Plaintiff declared, That the Defendant in Consideration that the Plaintiff would deliver such silver Threads, and other Wares into the Shop of J. S. that he should require, that he would see him paid.

Now, after an Assumpsit pleaded, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Plaintiff had not averred in his Declaration that J. S. had not paid for the Goods: For the promise to see him paid, was no more than if he had said, If J. S. doth not pay you, I will; in which Case such Averment must have been.

But the Court Resolved, that a Promise to pay, and to see him paid, was all one, and the Averment unnecessary.

Rushden versus Collins.

In an Assumpsit the Plaintiff declared the Consideration to be, pro opere preantea facto. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that opere was too general, and might intend so inconsiderable a matter as would not amount to a Consideration for the Plaintiff: But they gave Judgment; for they said labore or servitio had been adjudged sufficient.

Lee versus Edwards.

In an Assumpsit the Plaintiff declared, That in Consideration that he would employ his skill and pains, and provide Medicaments for, and Cure a certain person of a Pthysick, that he would pay what he deserved; and lays another Promise at the same time in Consideration as aforesaid, and alleges the Promise somewhat varying from the first; and concludes with an Averment, That he had bestowed his pains, and cured accordingly.

Upon Non Assumpsit pleaded, and a Verdict for the Plaintiff, the Court was moved to stay Judgment, because the Plaintiff had made no Averment of the Cure upon the first Promise, and entire Damages were given; so it was ill in all. But the Court were of Opinion, That in regard he had Averred it upon the second Promise; so as it appeared upon Record that the Cure was done, it aided the omission of it in the first, especially being after a Verdict.

Nota, There is an Inquisition upon every ones death that dies in the Kings-Bench, by the Master of the Crown-Office and Coroner.

Pomfret versus Rycroft.

In a Writ of Covenant the Plaintiff declared, That the Defendant demised to him a House, with the use of a Pump, and that he suffered it to be so out of Repair, that it became Useless. To this Declaration the Defendant demurs; and Counsel being heard on either side divers times, the Court delivered their Opinions severally.

Keeling, Rainsford, and Moreton held, that the Action did lye, the Use of the Pump being part of the things demised, which Words make a Covenant, as in 4 Co. Noke's Case, and in 5 Co. Spencer's Case; If a man let an House together with Estovers, to be taken in the Wood of the Lessor, and afterwards the Wood is stubbed up, there Covenant lies for the Lessee. And Rainsford put this Case: If a mans Lets the Middle Rooms of his House to one, and the Upper to another, and lets the Roof of the House decay,

decay, he conceived Covenant would lie for the Lessee of the middle Roofing. And if a Parson makes a Lease, and then Relinquishes, he is liable to Covenant, as in 12 H. 4. And the Lessee would be at a mischief, for he should be a Trespasser to Enter and Repair; and if the Lessor ousts the Lessee of any of the things demised, 'tis clear that Covenant lies; and this is as much an ouster as can be in this case, where the Lessor is possessed himself. And so Judgment was given for the Plaintiff, against the Opinion of Twifden, who held strongly to the contrary; for he said he might have an Action upon the Case, and so remedy for his Damage. Also he held clearly, That he might Enter and Repair, as if one Licence another to lay Pipes in his Ground to convey Water, he may justifie an Entry to Repair the Pipes. And he cited a Case adjudged in 9 Jac. where one by Licence erected a Cock of Hay in anothers Ground: And it was held, That the Owner of the Soil might put in his Beasts into that Ground; but he that had the Licence, might by vertue of that Licence also fence in his Hay. Quando aliquid conceditur, conceditur & id sine quo res ipsa uti non potest; and he said that he never met with a Case where Covenant would lie but upon an actual ouster, either by a Stranger that hath eigne Title, or the Lessor himself: And this was a non fealsans, and in that he differenced it from the Case of Estovers, being an actual Tort to stub the Wood up; and in Covenant upon an ouster of a Term, if it be not incurred, Judgment shall be to recover the Term it self, as F. N. B. 145. which cannot be in this Case, for the Sheriff cannot put him into possession of the use of the Pump; neither is it fit that he should recover Damages for all the Term, for it may be the Pump will be presently repaired. And he conceived, that if the Lessor Cuts down Trees growing upon the Land Demised, no Covenant lies, yet the Trees are Demised with the rest. Ante.

Anonymus.

A Draws a Bill upon B. to the use of C. and upon Non-payment C. Protests the Bill; he cannot Sue A. unless he gives him notice that the Bill is Protested; for A. may have the Effects of B. in his Hands, by which he may satisfy himself.

Note, It was said, if an Action to recover Lands of which a Fine was Levied, were brought and discontinued by the Demandant, this would not amount to a Claim.

Glyn

Glyn *versus* Smith.

A Scire facias upon a Record in the Kings Bench, where the Action is brought by Original, must alledge a place where the Court was holden; because 'tis Ambulatory, and the Writs returnable there are coram nobis ubicunque tunc fuerimus in Angliā. But it is otherwise upon Records in the Common Pleas, so that is confined to a certain place by Magna Charta.

Anonymus.

It was moved to quash a Return of a Rescous, because it was Mandavi Ballivis, who took him virtute Warr' præd' And it was said, Mandavi did not imply that it was in Writing. But the Exception was disallowed by the Court.

Anonymus.

If the Party that brings an Audita Querela be out of Prison, the Court will Bail him, though grounded upon a surmise of a matter of fact, as payment, &c. But if he be in Prison, not, unless there be a Specialty.

Parries Case.

Divers Deeds and Evidences were shewn to Counsel for his Opinion of the Title to certain Lands which were to be sold.

He delivers them to one Parry a Scrivener, by the consent of the Parties. Parry finding a Deed to concern the interest of a third person, gives it to him, and upon complaint to the Court, they commanded him to produce the Deed, that it might be delivered back again to the Parties, they conceiving it an abuse in his practice, which was under the Regulation of this Court.

Anonymus.

In Replevin, in the Court at Canterbury, the Defendant abounded for Kent.

Afterward this was removed by the Plaintiff into the Kings-Bench, and the Defendant prayed a Procedendo; because Canterbury was a County of it self, and no Assizes there, and so the Cause could not be tried: But the Court denied it, saying, it was their own fault that they had not the Assizes there, and every Subject had the liberty of removing his Suit into a Superiour Court. Twissden said, He had formerly known it to be denied in an Ejectment.

Girlington

Girlington versus Pitfield.

IN an Action upon the Case, for maliciously prosecuting of an Indictment of Perjury against him, of which he was acquitted; upon Not guilty pleaded, it appeared upon the Evidence, that the Defendant was a Justice of the Peace, and procured some as Witnesses to appear against him, and his own name was endorsed upon the Indictment to give Evidence.

The Court agreed that this did not make him a Prosecutor; for if a Justice of the Peace knows any person that can give Evidence against one that is indicted, he ought to cause him to do it. But it was proved on the Defendant's side, That this Indictment was drawn up by an Order of the Sessions. Wherefore Keeling Chief Justice said, That the Plaintiff deserved to be bound to his Good Behaviour for bringing of this Action.

Horne versus Ivis.

IN Trespass for taking of a Ship and Sails, the Defendant justified by a command from the Governours and Society of the Trade into the Canaries, who were Incorporated by that name, and had the sole Trade granted to them, with a forfeiture of all such Goods as should be imported thither from thence, by any person not of their Company; and that the Ship of the Plaintiff brought Goods from thence. To this the Plaintiff Demurred.

His Counsel did not much insist upon the validity of the Patent, because it was a Monopoly; though it was said to be also against divers Statutes, to Prohibit Merchants free trading to foreign parts, as 9 E. 3. cap. 1. 25 Ed. 3. cap. 2. 11 R. 2. cap. 7. and that there could grow no forfeiture of Goods by Patent, at least not before Conviction. Neither were the words of the Patent very full to this purpose, for they were only, That they should forfeit such Ships and Goods, and be imprisoned as by Law could be inflicted upon the Contemners of the Kings Authority, 8 Co. 125. Noy 183. And the Court said the question was, Whether the King could Prohibit the Importation of foreign Goods; for if he might, the Importation of them would cause them to be forfeited; And the Chief Justice said, The Ship also in which they were shipped: But no forfeiture of English Goods could grow by Letters Patents. And admitting all this for the Defendant, yet it was said the Plea was naught. First, Because he justified by a Command from a Corporation, and did not alledge it to be by Deed: And it was agreed, that a Corporation might employ one in ordinary Services without Deed, as to be Burler, 18 Ed. 4. 8. Br. Corp. 59.

or the like: But one could not appear in an Assize as a Bailiff to a Corporation without Deed, Pl.Com. 797. 12 H. 7. 27. Neither can they Licence one to take their Trees without Deed, nor send one to make a Claim to Lands, 9 Ed. 4. 39. They cannot make themselves Disseisors by their assent without Deed, or Command one to Enter for a Condition broken, 7 H. 7. 9. Rolls Tit. Corp. 514. Again it was said, The Plea was double, for that the Patent prohibits the Trading thither, and also Importing from thence; and 'tis said that he loaded Wines there and brought them hither, so an offence respecting both Parts, and one would have served. But of these matters the Court would be advised.

Burwells Case.

UPon complaint to two Justices about a Bastard Child; they by the 18 Eliz. order one Reynolds to keep the Child: Upon this Reynolds appeared at Sessions; where they vacated the Order, and referred it back again to the Justices, who do nothing.

The next Sessions after Burwell is judged the reputed Father, and ordered to pay so much a Week to the Parish, until the Child was 12 year old. This was removed into the Kings Bench by Certiorari.

And they resolved, That the referring back again to the Justices, by the Justices at the Sessions, was not warranted; and that the last Order was insufficient, because it was that he should pay the Parish due time until the Child was 12 year old, whereas the Father might take it away when he pleased; but it ought to have been, that he should allow so long as it should be chargeable to the Parish; wherefore they bound the Parties to appear at the next Sessions by Recognizance.

Anonymus.

A Man hath a Messuage and a Way to it through anothers Freehold, and 'tis stopped, then the House is aliened, the Alienee can bring no Action for this Nuisance before request.

If a Man lets a House reserving a Way thorough it to a Back-house, he cannot come thorough the House without request, and that too, at seasonable times.

Anonymus.

Anonymus.

If the Husband and Wife be Arrested in an Action that requires Special Bail, and the Husband puts in Bail for himself, he must put in Bail for his Wife also; but if he lies in Prison, the Wife cannot be let out upon Common Bail. But it is otherwise, if the Husband absconds himself and cannot be Arrested.

Anonymus.

If a Man brings Debt for Rent, and upon his own shewing he demands more than is due, and upon non debet pleaded, the Jury find for him, he may remit the overplus, and have Judgment for the residue.

Note, One was Committed for sending of a Note to a Jurymen, (after a private Verdict was given,) to know what Verdict they gave.

Parris's Case.

An Information was brought against him, for that he fraudulently & deceptively procured one Ann Wigmore to give a Warrant of Attorney to confess a Judgment.

To this he pleaded Not guilty, and upon the Tryal it was debated, whether she might be admitted to give Evidence against the Defendant; for if he were Convicted, the Court said they should set aside the Judgment. Nevertheless she was sworn, by the Opinion of 3 Judges, against Twilden, This Suit being for the King. Upon his Tryal he was found Guilty, and fined 100 Marks, and ordered to come with a Paper on his Hat expressing the offence.

Note, No Writ of Error to reverse a Judgment given in an Action, qui tam, &c. lies into the Exchequer Chamber, because the King is Party; so also upon the Statute de Scandalis Magistratum, 1 Cro. Lord Says Case.

Perill versus Shaw.

A Scire facias was brought against the Bail, who pleads that before the Return a Capias was issued out against the Principal; and that he was taken at D. and detained in Prison quousque postea he paid the Money; The Plaintiff pleads non solvit. Then the Defendant Demurs.

D

And

And it was adjudged for the Plaintiff; for the Defendants Plea was vitious, because there is no place alledged where the Money was paid; and it is not necessary to be intended to be paid where he was Imprisoned: And though the Plaintiff did not Demurr, but replied; yet when there is a Demurrer, the first fault is fatal.

Sir John Kerle *versus* Osgood.

AN Action was brought for these words, spoken of him being Justice of the Peace, He is a forsworn Justice, and not fit to be a Justice of Peace; if I did see him I would tell him it so to his Face.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That these words were not actionable, because forsworn doth not necessarily intend any judicial Perjury, and there was no Communication of his Office. One said of a Justice of Peace, He is a Blood-sucker and seeks after Blood; if one will give him a couple of Capons he will do any thing, and held not actionable; because there was nothing to make them relate to his Office, Rolls 56, 29. Nevertheless, the Plaintiff had his Judgment by the Opinion of all the Court; for the calling of him forsworn Justice, shews he intended Perjury relating to his Office; to which an Oath is annexed.

Manwood brought an Action for calling of him A corrupt Judge, 4 Co. Cases of Slander. 1 Cro. for calling of an Attorney A cheating Attorney. And Sir John Masham recovered for calling of him Half-eared Justice. Vid. Rolls 53. pl. 4. and 4 Co. Stucleys Case. And here the latter words, viz. That he is not fit to sit upon a Bench, shews that he intended the Scandal in his Office; and words shall not be taken in mitiori sensu, so far as to draw them from the general Acceptation; and sermo refert ad conditionem personæ.

Twisden cited a Case, where a Man brought an Action for saying, He was a Debaucht Man, and not fit to be a Justice of the Peace; and not maintainable, because spoken of the time past: If it had been, He is Debauched, he said the Action would lie.

Hill *versus* Langley.

DEbt upon a Bond to perform an Award. After nullum secere Arbitrium pleaded, The Plaintiff replies and sets forth, That they submitted to the Award of 4, so that they made it by the 16th of Nov. and signified it under the Hands and Seals of two of them, and then alledges the Award under two of their Seals; to which the Defendant demurred, conceiving the Award to be void, because

cause the submission was to four. But the Court gave Judgment for the Plaintiff, according to the Cases in 2 Cro. 276. and 400.

Anonymus.

In an Indictment for the using of a Trade contrary to the Statute of 5 Eliz. It was said, That to keep a Shop within a Country Village was not within the Statute; and it were very inconvenient, that the Inhabitants must go to some great Town upon every occasion. And it was also Juratores dicunt super Sacramentum suum, and not ad tunc & ibidem jurati.

If a Statute appoints an Indictment to be taken at the Quarter Sessions, the Caption must be Entred ad Quaterial Session, &c. for ad General Session pacis will not serve.

Jackson *versus* Gabree.

Jackson took out a Capias ad satisfaciend' against Gabree and his Wife; the Gaoler lets the Husband escape. The Court was moved, that the Wife might be discharged; alledging that the Husband took no care of her, but let her lie there in a very necessitous Condition. They were doubtful what to do in it at the first motion, but did afterwards resolve, That unless the Plaintiff would get the Husband taken again, as he might do, they would discharge the Wife; and they said, the Escape of the Husband was the Escape of the Wife.

Anonymus.

An Infant brought an Assumpsit by his Guardian, and declared, That whereas the Defendant entred into his Close and cut his Grass, that in consideration that he would permit him to make it Hay, and carry it away, he promised to give him six pounds for it; and he also declared for six pounds Debe more that he ought him.

Upon this Declaration the Defendant demurred, supposing it to be no Consideration; for the Infant was not bound by his permission, but might Sue him notwithstanding; and then the promise to pay six pounds Debe was not good, because not declared how indebted. But the Court gave Judgment for the Plaintiff.

Sir Henry Frederick Thynne *versus* Sir James Thynne.

PAsc. 13 Car. 2. B.R. Rot. 448. Upon a Special Issue directed out of Chancery, the Case was thus. One was seized in Tail of the Mannor of B. and of two Closes, which in reality were not part, but

but reputed part thereof, and suffered a Recovery only of the Mannor with the Appurtenances; and whether the Recovery was a Bar as to the two Closes, was the Question. And in the 16 year of this King, it was resolved by all the Court, and Hide Chief Justice delivered the Opinion of the Court, That the Lands reputed parcel of the Mannor should pass, by reason of the Deed of Covenants to lead the uses, which explained the intent, Dier 123. 1 Cro. Sir George Symond's Case, Hob. 177. Dier 376. Long 510. E. 4. 303. 6 Co. Sir Moyle Fynch's Case. Modern Rep. 250.

Termino Sancti Hillarij, Anno 21 & 22 Car. II.

In Banco Regis.

Wilbraham *versus* Snow.

IN an Action of Trover the Plaintiff declares, That he was Owner and possessed of certain Goods, and sets them forth particularly, and that they came to the Defendants Hands, who converted them, &c. The Defendant pleaded Not guilty, and the Jury find this Special Verdict.

That the Plaintiff was Sheriff, and that he took the Goods into his Possession by force of a Fieri facias; and that the Defendant (who was also Defendant in the Execution) took them away. And then they demand the Judgment of the Court, if the Plaintiff could maintain this Action.

It was said that he might, Because he was answerable over to the Plaintiff in the Execution at whose Suit he took them; and could not return that they were taken away: And if he returns, that he hath taken Goods sufficient, and after looses them, he is bound to answer the value as returned. A Bailie of Goods shall bring Trespass, quare bona sua cepit; And Rolls 5. a Carrier from whom Goods are taken may bring Trover. But it was argued on the other side, That the property is in the Defendant, notwithstanding the seizure, Dier 99. a. and Yelverton 44. And the Sheriff had but an Authority in Law to Sell, as Commissioners of Bankrupt have of the Estate of the Bankrupt per 13 Eliz. 7. 02 Executors upon a Devise, that they shall Sell Land, &c. but Trespass he might bring, because of the Possession, but Trover cannot be maintained without property.

But the Court held that the Action was maintainable; And that the reason was the same, as in the Case of the Carrier; and also held that the Defendants Property ceased by the Seizure: And also, that if a Man becomes a Bankrupt after that the Commissioners have granted over his Goods, he cannot meddle with them, 1 Cro. 106. So by the Opinion of Keeling, Rainsford and Moreton, *hæsitante Twisden*, Judgment was given for the Plaintiff.

Gavell and his Wife *versus* Burket.

An Action was brought for these Words spoken of the Wife, You are a Pimp, and a Bawd, and fetch young Gentlemen to young Gentlemen, and Declared of a Special Damage. The Jury gave a Special Verdict, and found the Words spoken; but not the Damage, as the Plaintiff had Declared. Now, whether the Words were Actionable of themselves, was the Question.

And it was Agreed, that no Action would lye for calling one Bawd or Pimp, 1 Cro. 286. *Dimock's Case*, Rolls 44. pl. 10. But to say one keeps a Bawdy-house, it will lye, 27 H. 8. 14. an Indictment lies for Keeping of a Bawdy-House, because it is a Common Nuisance; but here the subsequent words expound in what sense the former words should be taken, that is, To bring Gentlewomen to Gentlemen for Bawdry, which is as much as keeping a Bawdy-house; and 1 Cro. was cited where Judgment, was given for these words, Thou keepest a House worse than a Bawdy-house, and keepest a Whore in thy House. And in 3 H. 7. it is said, that Constables ought to apprehend Bawds.

But the Court inclined, that the Action would not lye; for a Bawd was not punishable in our Law, unless for Keeping of a Bawdy-House, it being a Crime of Ecclesiastical Consistory. Sed Adjournatur.

Thomlinson *versus* Hunter.

TRespass, Quare clausum fregit & arbores succidit ad valentiam decem librarum. To which the Defendant Demurred generally. The Plaintiff prayed Judgment for Breaking of his Close; but as to the other, the Declaration was Insufficient, because not expressed what kind of Trees.

5 Co. Play-
er's Case.

Anonymus.

A Writ of Error was brought upon a Judgment given in Ireland. It was held that a Day ought to be given by Rule of Court to the Plaintiff, to assign his Errors, or else to Nonsuit him; for the Defendant could have no Scire facias into Ireland.

Dyer 76. b.

Leach

Leech *versus* Widsley.

In an Action of Trespas for Chasing of his Sheep, and Impounding of them, and there Detaining of them until he gave him 12 d. per quod one of the Sheep died. The Defendant pleads, that J. S. was seised in fee of the place Where, and that the Sheep were there Damage feasant, and that he by the Command of J. S. leniter chaceavit eas, and Impounded them until he gave him satisfaction, quæ est eadem Transgressio. The Plaintiff in his Replication entitles himself to Common there. The Defendant Replies, and says, that the place Where was parcel of a great Masse, wherein the Plaintiff had Common appurtenant, and that the Lord Inclosed the place Where, and that the Plaintiff had tempore quo, &c. & semper postea, sufficient Common for all his Sheep levant and couchant. To which the Plaintiff Demurs,

first, for that the Bar was Insufficient; for the Plaintiff chargeth him with detaining them until he paid him a Shilling; and he pleads, that he detained them until he gave him satisfaction; sed non allocatur.

Vid. 3 Cro.
384. *Hill*
and *Pride-*
aux's Case;
but here
the Plain-
tiff hath
waived that
Advantage
by plead-
ing over.

Again, He doth not answer to the killing of the Sheep; sed non allocatur; for he pleads leniter chaceavit; so that if the Sheep did dye he is not answerable; neither doth the Plaintiff declare of any extraordinary Chasing; but alledges the dying of the Sheep only in aggravation of the Damages, coming after the Per quod, and that is not traversable: As in an Action for Beating of his Servant, per quod servitium amisit, the loss of the Service cannot be traversed.

But that which was most insisted on was what he alledges in his Reply: (viz.) That the Plaintiff had Common sufficient left him for his Sheep levant and couchant upon the Tenements Whereas he ought to have said, Sufficient ad tenementa prædicta. For it may be the Ground was understocked. Also, 'tis not set forth, that he had free Egress and Regress; the Words of the Statute of Merton are, Tantam pasturam habeant quantum sufficit ad tenementa sua, & quod habeant liberum ingressum; sed non allocatur, for his Sheep levant and couchant, is intended as many as the Land will maintain, and if there were no Egress or Regress, it ought to come on the other side. So Judgment was given for the Defendant, nisi causa.

Anonymus.

An Infant Executor brings an Action. It was said by Twiggden, That it had been Adjudged, that he ought to sue by Guardian.

Elie

Ely *versus* Ward.

In a Writ of Error to Reverse a Judgment given in the Court at Hull; upon an Assumpsit the Plaintiff declared, That it was Agreed between them at a place *infra Jurisdictionem Curie*, That upon Request, &c. and that he Requested him at a place *infra Jurisdictionem Curie*.

It was assigned for Error, That this Action ought not to have been brought in Hull, because the Request was not appointed to be made within the Jurisdiction by Agreement. *Sed non allocatur*, As long as the Agreement and Request were made there, tho' the Request might have been elsewhere.

Another Error was assigned, in that the Precept to the Serjeant at Mace for Returning of the Jury was, *Probos & legales homines qui nulli affinitat'*, &c. *attingunt*, whereas the Form of the *Venire* is, *attingunt*. *Sed non allocatur*: for it was held to be as well. Tho' Twilden said, The Form of a Writ ought not to be altered into another Expression of the same signification.

Then the Entry was, *Ad quem diem venerunt* the Plaintiff and Defendant, & Juratores; and it should have been, *Veniunt*; sed his non obstantibus the Judgment was affirmed.

Anonymus.

It was held, That if the Sheriff Returns a *Capi Corpus* upon a *Capias*, altho' he hath not his Body in Court at the day of the Return, yet no Action can be brought against him, but he is to be amerced for it at the Common Law. One so taken could not be Bailed, but by a *Homine Replegiando*; and now the Statute of the 23th of H.6. obliges the Sheriff to take Bail, however the Return is as at the Common Law, *Capi Corpus*.

Freeman *versus* Barnes.

TRin. 10 Car. 2. Rot. 554. Error to Reverse a Judgment given in *Communi Banco* in an Ejectment; where, upon Not Guilty pleaded, the Jury found a Special Verdict to this effect: Tenant in Fee makes a Lease for an hundred years, in Trust for himself, to wait upon the Inheritance; the Lessee enters, *Cestuy que Trust* enters and takes the Profits, and makes several Leases, all which being expired, he makes a Lease for 54 years, and for the corroborating of it Levies a Fine with Proclamations; the Lessee enters, 5 years pass. And Tyrrel and Archer (they being the only Judges in the Common Plea then) gave Judgment, That the Fine should bar the Lessee for an hundred years. Upon which a Writ of Error was brought

brought in this Court, and Argued this Term by Levins for the Plaintiff in the Writ of Error; and Finch, Solicitor for the Defendant.

And for the Reversing of the Judgment, Levins Argued, That this Lease by the Cestuy que Trust, and the Entry of his Lessee, did not dispossess the former Lessee; and then the Fine and Non-claim could not prejudice his Interest, which was not put to a right: For first, the Cestuy que Trust was at least Tenant at Will. So is Littleton, Sect. 464. Cestuy que Use may enter, and hold at the Will of his Feoffees; then his Lease can be no Disseisin, because the Inheritance was in himself. 'Tis true, in some Cases a man may do an Act which shall divest his own Estate: As if a Stranger disseises Tenant for Life to the use of him in the Reversion, and he assents, Co. Lit. 180. b. the Law shall not construe a Disseisin against the parties Intention, Rolls 661. He that enters by colour of a void Lease is no Disseisor, 1 Cro. 188. nor any one that enters by Consent, 15 E. 4. 5. b. Neither shall the Interest of the Lessee be divested but at his Election; for this Lease works in point of Contract, and not so violently upon other mens Interests as Liberty doth. In Latche's Rep. 75. Sir Thomas Fisher's Case, Tenant for years lets at Will, the Lessee makes a Lease for years; this works no dispossession. If a Copyholder makes a Lease for years without Licence, the Entry of the Lessee is no Disseisin to the Lord, and he may chuse whether he will take it as a forfeiture, Rolls 830. Lease for years, upon Condition to be void upon Non-payment of Rent, a demand is made, the Lessor may make a new Lease of the Land, the former Lessee being still in possession. And Blunden and Baugh's Case was cited in 1 Cro. to the same purpose; and that a Fine doth not bar an Interest which is not divested. He quoted also the 1 Inst. 388. 9 Co. 106. and 5 Co. Saffin's Case, where a Fine and Non claim shall bar the Interest of a Term; yet it appears in 2 Cro. 60. that two Judges were against that Judgment given by the other three, 2 Cro. 659. Tenant at Will makes a Lease for years, and it was held to be no Disseisin volens nolens to him that had the Inheritance. And for Isham and Morris's Case, 1 Cro. 74. it was the Judges Opinion upon Evidence, and there a Fine was levied of the Inheritance, which passed the Trust inclusively; but this Fine was only to establish an Interest for 54 years. Then he Argued, that the Inconvenience would be very great to Purchasers, who often keep such Leases and Interests on foot, tho' they buy the Inheritance, if they should be all barred by Levying of the Fine.

The Solicitor *contra*, He agreed that a Fine could not bar any Interest, which was not divested at the time of the Fine. He Argued first, That the Cestuy que Trust was not Tenant at Will; for a man shall not be Tenant at Will against his own Conveyance, unless

unless by Construction of Law, to avoid a Tort; as in Littleton's Case, where the Cestuy que Use enters upon his Feoffee. But tho' the Lessor hath a right to the possession before the Entry of his Lessee for years; yet when the Lessee Enters, as 'tis found in our Case, he doth as much as declare, that Cestuy que Trust Shall not be Tenant at Will. Indeed the Bargainer of an Estate for years; is in actual possession by force of the Statute; yet the Bargainor (in case of a Mortgage) may Enter to hold at Will, because there was no Act done to express his dissent. He agreed also, that no Disseisin was wrought; but there may be an Expulsion without a Disseisin, as Hob. 322. where it is said, If the Lessor puts out his Lessee for years, there is no Disseisin committed; and yet the Lessee hath lost his Estate, and hath but a Right to it, and that whether he will or no: And if he were Tenant at Will, he by making this, and divers Leases before, hath absolutely determined his Will; if Tenant at Will be ousted by a Stranger, and he in Reversion disseised he may enter again; not where he is the Wrong-doer himself, for that were to make him Tenant at Will against his Will. If Tenant at Will makes a Lease for years, and the Lessee enters, the Tenant at Will is the Disseisor, 2 Cro. 660. 3 Cro. 830. 5 E. 4. 2. and Tenant at Will is intrusted with and hath power over the possession. And where it was said, it should be in the Election of the Lessee for 100 years, to take this for an Ejection or no, he Argued that it ought clearly to be in the Election of the Lessor.

For, first, it was his own act, and therefore he could best explain quo animo hoc fecit, and that his antecedent Acts had sufficiently done, especially being Cestuy que Trust, and having also the Inheritance in him; and he insisted very much upon the Notice that the Law takes of such an Interest, tho' relievable only in Equity, 7 H. 3. Cestuy que Use of a Manor, to which an Advowson was appendant, was Outlawed, the Church became void; the King brought a Quare Impedit, 2 Cro. 512. A Trust of a Chancel, resolved to be forfeit by Attainder, Hob. 214. in that case the King shall have the Land it self, and Process shall issue out of the Exchequer to seize the Land it self, which shews that it hath a legal influence upon the Land; therefore, he and not the Trustee, ought to have the Election. If Cestuy que Use had made a Lease for years, this had been a Disseisin, until 1 R. 3. 5 H. 7. 56. 8 H. 7. 8. A Lease of two Acres, habendum the one for Life, the other in Fee, to the use of another; shall not the Cestuy que Use determine in which the Inheritance shall be? Again, It is agreed that this Fine conveys away the Trust; shall the Law strain to save the Interest of the Trustee; to occasion a Chancery Suit? And the Judges ever Expounded the Statute of 4 R. 7. strictly, to bind the Right of Strangers, Leonard 99. It was the Chief Baron Man-

wood's Opinion, That he that had a future Interest to Lands, of which a Fine was Levied, ought not to have five years after his Interest came in esse, neither is there any reason to favour long Leases. By the Ancient Law, a Lease for above 40 years was void, Mirror 164, 293. 1st Inst. 46. they are never without suspicion of fraud: and 3 Co. Twyne's Case, that which is called a Trust, is in plain English a Fraud; and as this is found, it appears by the Circumstances to be almost Fraud apparent. And as to the Inconvenience which was alledged would come to Purchasers, who desire to keep Leases on foot, he Answered, That might be prevented by claiming within five years; and it would be mischievous to Purchasers if it were otherwise, to have such Leases set up against their Titles. Postea.

Note, One makes a Lease, wherein the Lessee Covenants to Repair, and then bargains and sells part of the Reversion; He shall have an Action of Covenant per 32 H. 8.

Bosvile versus Coates.

IN Debt upon a Bond with Condition, That the Obligor should bring in the Son and Daughter of J. S. at their full Age, to give such Releases as a Third person shall require. The Defendant pleads, That the Son is alive under Age at Doncaster. To which the Plaintiff demurs, and held he might; for it must be taken at their respective Ages. Vid. 5 Co. Justice Wyndham's Case.

Crispe and Jackson versus The Mayor and Commonalty of Berwick.

IN a Writ of Covenant, the Plaintiffs declared upon an Indenture of Demise of an House from the Defendants, wherein they Covenanted, That the Plaintiffs should enjoy it without the Interruption of any Persons whatsoever; and assigned for Breach, That J. S. entred and dispossessed them at Berwick. Upon which the Defendant takes Issue. Whereupon the Plaintiff suggests, That such a place in Northumberland is the next to Berwick; and the Venire is awarded to the Sheriff accordingly, and a Verdict was found for the Plaintiff.

It was moved by Jones in Arrest of Judgment, That here was a Mis-Trial, not aided by any Statute; for the last Act, which is the largest, remedies all Trials, so as they be in the proper County; but this is not so: And he said, It ought to have been tried where the Action was laid. As when an Action is brought upon a Charter-Party, and a Breach is assigned in a foreign Kingdom, it shall be Tried where the Charter-Party is dated; and here the

Covenant

Covenant boze Date at the Castle of York, and there the Trial ought to have been, 6 Co Dowdale's Case; and Berwick is part of Scotland, and bound by our Acts of Parliament, because Conquered in Edward the Fourth's time: But the course is to name it expressly, because 'tis out of the Realm, and not like to Wales, where the Trials in such Cases shall be out of the prochein County, 19 Hen. 6. 12. for that is a Member of England: Vid. 7 Co. Calvin's Case. But two Presidents being shewn, where the Trials were as it is here, and one of them affirmed in a Writ of Error; also the Case in Rolls tit. Trial, 597. A Writ of Error was brought to Reverse a Judgment given in Ireland, and an Error in Fact was assigned and tryed in a County next to Ireland: The Court Ruled the Venire to be well awarded.

Twisden said. The Reason why an Ejectment would not lye of Lands in Jamaica, or any of the Kings foreign Territories, was, Because the Courts here could not command them to do Execution there; for they have no Sheriffs.

This Case having remained two or three Terms since the Postea was Returned, and no Continuances Entred, one of the Plaintiffs died, and it was doubted whether Judgment could be now Entred: And the Secondary said, That they did Enter up Judgments two Terms after the Day in Bank, as at the Day in Bank, without any Continuances. And of this Matter the Court would be Advised. Postea.

Anonymus.

If one, upon Complaint to two Justices, be Ordered to keep a Bastard Child, and this upon an Appeal to the Sessions is revoked, ^{1 Cro. Pri- geon's Case.} that Person is absolutely discharged; and unless a Father can be found, the Court said, the Justices of Peace must keep it themselves.

The Earl of Peterborough *versus* Sir John Mordant.

In an Action upon the Statute de Scandalis Magnarum, for speaking these Words of the Plaintiff, I do not know but my Lord of Peterborough sent Gybbs to take my Purse. After Judgment, by Default, and a Writ of Enquiry of Damages returned, it was moved in Arrest of Judgment, that no Action would lye for these Words.

First, He doth not positively charge him with it.

Again, The Words do not import a felonious taking, Hob. 326. Mason's Case, I charge him with Felony, for taking Money out of the Pocket of *H. Stacie*; adjudged not Actionable. And in 1 Cro. 312. Thou didst set upon me and take my Purse; go before a Justice and I will charge you with Felony. It was held there that no Action would lye.

I 2

But

But the Court gave Judgment for the Plaintiff. As to the first, it was held as much as a direct Affirmation; for otherwise one might slander another, and by such a slight Evasion escape an Action.

Twisden said, He knew these Words adjudged Actionable; He hides himself for Debt, and for ought I know is 'a Bankrupt.

And for the Words the Court said, There was difference between an Action grounded upon the Statute de Scandalis Magnatum, and a Common Action of Slander. The Chief Justice said, The Words in the one case shall be taken in mitiori sensu, and in the other in the worst sense against the Speaker, that the Honour of such Great Persons may be preserved. More 55. The Earl of Leicester had Judgment for these words, My Lord of Leicester is a Cruel Man, an Oppressor, and an Enemy to Reformation, Leon. 33. The Lord Abergavenny sued for these words, My Lord Abergavenny sent for us, and put some of us into the Stocks, some to the Coal-house, and some to the Prison in his House called *Little Ease*. And Recovered. Vide Crompton's Jurisdiction of Courts, 13. and Leonard, 336.

Anonymus.

A Indictment was, Compertum fuit per Sacramentum duodecim proborum & legalium hominum, &c. and quashed, because it was not jurat' & onerat'. And the Clerk of the Crown-Office Informed the Court, that that was always the Course; also it must be, Adtunc & ibidem jurat', where the Caption is recited to be taken.

Williams versus Gwyn.

Error to Reverse a Judgment given in Dower in the Grand Sessions in Wales. It appeared by the Record, that the Tenant appeared upon the Summons Returned, and Day was given over, & adtunc venit per Attornatum & nihil dicit in barram: Whereupon, Consideratum est quod tertia pars terr' & tenemen' capiatur in man' Domini Regis, and Day was given ad audiend' Judicium; at which Day Judgment was given quod recuperet.

It was Assigned for Error, that the Court here had awarded a Petit Cape, and yet the Defendant appeared, whereas they should have given Judgment upon the Nient dedire; for a Petit Cape is always upon default after appearance, and only to answer the Default: The Grand Cape is before appearance, to answer the Default and the Demand, Ver. N. B. 97. So it was said, the Court had erred in Judgment; and tho' it were in advantage of the Tenant by the delay, yet not being by his Prier as an Effolgn Granted, where none ought to be, is not Error, but the act of the Court,

Court, as if they should Enter a Misericordia for a Capiatur, it were Erroneous.

But the Court answered, That the reason of that was, Because it is parcel of the Judgment, and the King should lose his Fine; But this was only the awarding of Process more than should be, and in advantage of the Tenant, wherefore they resolved that they could not Reverse it for Error. And Twisden said, Admitting it were Erroneous, they might then give Judgment in this Court.

Anonymus.

A Prohibition was prayed to the Arches for Libelling against one there, for calling Whore and Baud, because they were but words of Heat; also the Party lived in the Diocess of London, so against 23 H. 8. to Cite him there. But the Court would not grant it; for though formerly there hath been divers Opinions touching these words, yet Twisden said ever since 8 Car. the Law hath been taken, that they may punish such words, pro reformatione morum. And for the other, it appeared Sentence was given, and that it was too late to pray a Prohibition, when it appears they have Jurisdiction of the Cause, as the Superiour Court; and he that would have the benefit of the Statute against citing out of the Diocess, must come before Sentence, 1 Cro.

Anonymus.

Finch Solicitor, moved for a Prohibition to the Ecclesiastical Court, to stay a Suit for Tythes of Hopps, commenced there by the Vicar, upon a Suggestion, that they had paid for all Tythe Hopps so much an Acre to the Parson, time out of mind. But it was denied; for there could be no such Composition time out of mind, Hopps not being known in England until Queen Elizabeths time; for then they were first brought out of Holland, though Beer is mentioned in a Statute in Henry the Fourth's time.

But it was said by the Court, That perhaps the Vicaridge was Endowed time out of mind of the small Tythes, of which nature Hopps were. Then the prescription of paying a Modus to the Parson, shall not take them from him; for it shall be taken to have commenced since the Endowment.

Note, If the Matter concerns the whole County, it is to be Tryed in another County which is indifferent.

Hall

Hall *versus* Philips.

An Information was brought for the forfeiture of a certain quantity of Brandy, and sets forth the two Acts, 13 & 14 Car. 2. c. 23 and 24 of Excise upon that and other Liquors, and then the additional Act of 15 Car. cap. 11. wherein it is Enacted, That no Foreign imported excisable Liquours shall be Landed, &c. before due Entry be first made thereof, &c. or before the Duty of Excise due and payable for the same be fully satisfied and paid; and that every Warrant for the Landing or Delivery of any such Foreign Liquors, shall be Signed by the Hand of the said Officer, &c. upon pain that all such Foreign Liquors as shall be landed, &c. contrary to the true intent and meaning thereof, or without the presence of an Officer or Wayter for the Excise, or the value thereof, shall be forfeited and lost, the one Moiety to the King, the other to him which shall seize, inform, &c. And avers that this Brandy was Landed, the Duty not fully satisfied and paid, and without the presence of an Officer or Wayter for the Excise; but doth not aver, that a due Entry was not first made thereof,

Whereupon it was moved, after a Verdict for the Informer, in Arrest of Judgment; that if either the Duty were paid, or Entry made, or the Landing were in the presence of an Officer, it satisfied the Act, which is in the Disjunctive, and, or shall not be taken Conjunctive, unless the words are of like nature, as 1 Mar. cap. 3. Maliciously or Contemptuously disturb Preachers; especially in a Penal Law. Besides, if the Act required these three things should be done, then payment would not suffice, without the presence of an Officer at the Landing; the like words are taken Disjunctively in Renigers Case, Pl. Com.

But it was said on the other side, That the word or, must be taken here in the Conjunctive, and that for the apparent inconvenience that would follow; and that the Statute intended all three should be performed, and that an Entry should not suffice without payment, or agreement with the Officer, which Tantamounts: For otherwise, this Act which was made to be further remedial to the King, would rather disappoint this Revenue of Excise given by former Acts, which did also require an Entry to be made; but this Act adds the Penalty for Non-entry, and this Entry is to be made for a check upon the Officer, that he accounts right to the King. Also it appoints Landing in the presence of the Officer, that it may be observed whether more be Landed than is contained in the Warrant for Landing; but never meant that Entry should suffice without payment; for so if Party be a Foreigner or Insolvent, the King loseth his Duty.

2 Cro. 322.

And

And the Court gave Judgment for the Informer: But said they would have staid until the next Term, but that great mischief might be done in the interim, if it should be known that such a doubt sticks here; and they would not give any encouragement to the lessening of the Kings Revenue.

Anonymus.

In an Indictment upon the Act, for coming within five Miles of a Corporation.

It was moved, that no Indictment lay upon it, because the Act appoints a Penalty of 40 l. to be recovered by Action of Debt, Bill, Plaint or Information.

Sed non allocatur, for when a Statute makes an Offence, the King may punish it by Indictment; but an Information will not lye, when a Statute doth barely prohibit a thing, vid. 2 Cro. 643. 3 Cro. 544.

Note, It was resolved at Serjeants Inn, That when a Penalty is to be divided, (viz.) To the King, the Poor and the Informer. If the King alone Sue, so that there is no Informer, yet the Poor shall have their part.

Adrian Lampereve and other Frenchmens Case.

A Motion was made by the Solicitor, upon a Special Direction from the King, in behalf of the said Lampereve and others Frenchmen, to have a Certiorari to Bedford Gaol, where they were committed for Robbery.

Keeling Chief Justice, I lately attended his Majesty about this matter, and I thought he had been satisfied with what I then said and now repeat, (viz.) That if we should remove them now, we should discharge his Majesties Justice; for there is no Indictment found, and none can be found but at Bedford, and the Prosecutors and Witnesses are there; but he might have it Tryed at the Bar if he pleased, so the only way is to let them stay at Bedford till the Assizes; and then if Prosecutors appear not, or an *Ignoramus* be found, they will be discharged by Proclamation; and if the Indictment be found, then the Judge may take a new Recognizance of the Prosecutors to appear and Prosecute here; and you may have a *Certiorari* now to deliver there, or you may have it there from my Brother Rainsford, who goes that Circuit, to remove all up hither.

Solicitor. I suppose this will satisfy.

Curia. We must acquit our selves of the Kings Justice.

In

In Easter Term following they were brought up hither, and being Arraigned upon the Indictment, they pleaded Not guilty; and some of them desired to be Bailed, and the Court said they might, but it must be done in the Court, because the Bail must be bound Body for Body; and they required 4 Men to be Bail, each worth 300 l. Body for Body, and in no sum certain.

They were afterwards Tried per medietat' linguæ, and some of the Aliens were not Frenchmen, and most of them dwelt in Middlesex.

Lady Baltinglaff's Case.

The Court denied a Tryal at the Barr, because the Costs were not paid upon other Tryals, which went against her in other Courts; which the Court here would take notice of.

Articles were exhibited against a Register of an Ecclesiastical Court, for Misdemeanours done by him in his Office.

He moved for a Prohibition; but it would not be granted, unless they examin him concerning the Articles upon his Oath.

Wright and Johnson.

Assumpsit, To deliver a Gelding in as good plight as he borrowed him; and Avers, that he did not deliver him at all. A Verdict was had for the Plaintiff yet; Judgment was given against him, because the Breach was not laid as the Promise is.

Playters versus Sheering.

In a Replevin (removed by Recordari,) There was a Non-suit for want of a Declaration, and thereupon the Defendant made a Suggestion, and took out a Writ of Enquiry upon 17 Car. 2. cap. 7. The Plaintiff moved that this might be set aside, because the Non-suit hapened, through the sudden Sicknes of the person employed to prosecute.

Curia, This new Statute having taken away the Writ of Second Deliverance, hath made the Plaintiff remediless, unless we help him; therefore we will endeavour it as far as we can. Let the Defendant shew Cause, why he should not accept of a Declaration upon payment of Costs.

Termino *Paschæ*, Anno 22 Car. II.
In Banco Regis.

Anonymus.

If there be several Contracts between A. and B. at several times, for several sums, each sum under 40 s. and they do all amount to a sum sufficient to Entitle the Superiour Court; they shall be there put in Suit, and not in a Court which is not of Record. And so it was resolved in the Case of the Savoy Court, and Stanford 24. C. 2. Also it was said, That if a Man at divers times Steals things, all which amount to above 12d. 'tis Felony Capital.

In an Account after a Quod computet, the Court Assigns Auditors, and they sit upon and return the Account when they will; for day is not given them, and they give the Parties in the interim what time they please; but if the Defendant delays, they return it to the Court, and Process goes out against him.

Nota, Memorandum, On Tuesday April the 26th, Steven Mosdel, to whom Mr. Lenthall had granted the Office of Marshal of the Kings-Bench for life, was sworn Marshal. The Oath was this, (Viz.) You shall swear, that during the time of your being Marshal, you shall well and truly use, exercise, and behave your self in the said Office; you shall encrease no Fees, and in all things shall do your Duty in the said Office, &c.

It was resolved, That the said Stephen Mosdel could not afterwards practise as an Attorney of this Court; and that Mr. Lenthall Marshal in Reversion had no Privilege.

Anonymus.

A Promise was made to give 1000 l. to one for curing of his Eyes; and an Assumpsit is brought.

Upon this, the Jury may give less than 1000 l. Damages, if they think fit.

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Sir W. Mewes *versus* Mewes.

A Title of Land was tryed out of the proper County, upon a feigned Wager, Whether well conveyed or no, (this is the Course of Issues directed out of Chancery.)

Note, In this Case a Bill in Chancery was given in Evidence against the Complainant, though held to be but of slight moment.

Smiths Case.

Smith and other Commissioners of Sewers which sat at White-Chappel, were brought in upon an Attachment awarded against them, for a Contempt of this Court. And the Case was thus,

A Certiorari was lately sent and delivered to them out of this Court, (upon Special direction and recommendation by the King and Council, before whom the Business had been agitated) to remove hither Certain Orders and Proceedings of theirs, in order to a Tryal of the Right of the Matter in Question.

At first they did not allow the Certiorari, but afterwards having allowed it, they proceeded de novo upon the same Matter; and made an Order again, which certain persons (being the same persons who procured the Certiorari,) refusing to obey, the Commissioners fined them 10 l. apiece.

Then a second Certiorari was taken out and delivered to them; after which they imprisoned persons for not executing and obeying of a Warrant made upon their second Order, and for speaking Contumptuous words of the Commissioners, and fined them 5 l. apiece. Being now questioned by the Court, concerning these Contempts and Misemeanours, They said, they did this wholly by the advice of their Counsel Mr. Osley, (who being in Court received a severe Reprimand therefore;) and the Commissioners were committed to Prison.

About a fortnight afterwards, having made and filed their Return, they were brought into Court, to receive the Sentence of the Court. And then it was said by them and Coleman their Counsel; that they would not urge any thing in justification of their not returning their Proceedings, they only offered, that what they did was by the advice of their Counsel; and that the Clause in 13 Eliz. cap. 9. was so penned as to give a great occasion of doubt in this particular, which Clause upon their desire was read; And is this,

And be it further Enacted, &c. That from henceforth the said Commissioners of Sewers, nor any of them shall not be compelled,

or

or compellable to make any Certificate, or Return of the said Commissioners, or any of them, or of any of the Ordinances, Laws or doings, by the Authority of any of the said Commissions, nor shall not have any Fine, Pain or Amerciament set upon them, or any of them, or any ways to be molested in Body, Lands, or Goods for that Cause, and after the reading thereof, the Court delivered themselves seriatim, as followeth,

Moreton. This is a great Offence and Contempt; The Commissioners of Sewers and their Proceedings are subject to the Jurisdiction of this Court. Sir Henry Mildmayes Case, 2 Cro. 336. and Sir H. Hungates in our Memory: If Commissioners of Sewers, or any other inferiour Jurisdiction exceed their Commission, we may reform and restrain them, and so; nay we prohibit them in Cases where They have no Jurisdiction of the matter: Many precedents are with us in the present Case. And we cannot answer our Duty to the King, without taking notice of and punishing this Offence. Therefore my Opinion is, That for their not obeying of the first Writ, they be fined 40 Marks apiece, and for their not obeying of the second Writ 20 Marks apiece.

Rainsford: This is indisputably an Offence and Contempt; and the greater for that it was second. It is aggravated too; in that the Commissioners proceeded after they had allowed the Certiorari, and that they fell upon, and shewed their Indignation against those persons, who only pursued the Kings Authority; and that this was in a Case, which was recommended by the King and Council, to which Recommendation the Commissioners were Privy; they had contrary advice from other Counsel then there, but they would hearken to that advice which pleased them best: Obedience is that Ligament of the Government, without which all will be turned into Anarchy and Confusion. Without betraying the Trust reposed in us by the King, and violating of our Oaths, we cannot omit to punish this, therefore I agree the Fines: The Reason of the Fines, is the disobeying of the Writs; the Reason of their disproportion, is to resemble the Measures the Commissioners observed towards those persons whom they unduly fined.

Twisden. It was resolved in 23 Car. That this Statute hath no reference to this Court, and that this Clause extends only to Certificates and Returns into Chancery; the Statute speaks of Superseas, &c. which issue out of the Court of Chancery only; for this Court does not, nor ever did send out Superseas's, but this Court sends out Certiorari's, which are to bring the business before the King here, and the words of them are, quia coram nobis terminari volumus & non alibi. What should move that Gentleman to give such advice (as he did) I cannot imagin: I suppose there is more in the matter than we know, and 'tis a strange thing, that these Commissioners should ask Counsel, whether they should obey the Kings

Writ or no? Especially when it went out upon such particular direction and recommendation. 'Tis some mitigation, that they had such advice of Counsel; otherwise, I should not stick to fine them 100 l. apiece. We are bound to take care of the support of the Government. I agree the Fines.

Keeling Chief Justice. It is provided by 23 H.8. cap. 5. that the Laws, Acts, &c. to be made by the Commissioners of Sewers, should stand good and effectual, &c. no longer than the Commission endured, except they were Engrossed in Parchment, and certified under their Seals, into the Kings Court of Chancery; and then the Kings Royal Assent to be had to the same, &c. But that was altered by this of 13 Eliz. whereby it is Enacted, That their Laws, &c. should stand and continue in force, without any such Certificate to be made thereof into the Chancery; and then a little after in this Statute follows the Clause which hath been read, and that refers wholly to Certificates, or Returns to be made into the Chancery, for the purpose aforesaid. 'Tis plain, the Clause refers not to this Court, for it speaks of returning their Commissions; now their Commissions were never returnable into this Court; this Court cannot be ousted of its Jurisdiction without special words: here is the last Appeal, the King himself sits here, and that in person if the pleases, and his Predecessors have so done; and the King ought to have an account of what is done below in inferiour Jurisdictions. 'Tis for the avoiding of oppressions and other mischiefs. To deny and oppose this, and to set up uncontrollable Jurisdictions below, tends manifestly to a Commonwealth; and we ought, and we shall take care that there be no such thing in ours days. I know there is a great clamour, so soon as an inferiour Jurisdiction is touched; and tis thought we deal hardly with them: But unless we will suffer this Court to be dissolved, and the Prerogative of the King to be encroached upon, we must oppose our selves to these Proceedings.

I have a great respect for these persons the Commissioners, but 'tis but usque ad aras. When the Jurisdiction of the Crown, the Justice of the Kingdom, and the Duty of my place is concerned, I ought not to spare my best friends. Some Presidents have been cited in this Case, and many more might; there are two memorable Records cited, 1 Cro. concerning persons which condemned the Kings Writ and their Penalties. I agree the Fines, and hereby we do not go so high as our Predecessors have gone Hundreds of years ago.

Nota, This Proceeding and Sentence of the Court, was upon Confession of the Commissioners; the Court forthwith making an Entry and Record of their Confession.

In an Assize only, where the Writ is Returnable into this Court, it is apud Westmonaster; but in all other cases, where Writs are Returnable out of Chancery into this Court, they are Returnable Ubiunque, &c.

The King *versus* Jane D—.

She was Indicted for Stealing of several things, and pleading Not Guilty, and a Jury sworn to try her; the Witnesses not appearing, were suspected to be tampered with by the Prisoner; and the Jury were discharged, and the Trial put off. Vid. 1 Inst. 127.b.

Wife's Case.

An Order of the Justices of the Peace, for the maintenance of a Poor Woman, was Confirmed, tho' it appeared she was able of Body to work: But the Justices of the Peace are Judges of that.

Cousin's Case.

Error to Reverse a Fine for Infancy: Now 'twas moved, that the party being in Court she might be inspected, and the Inspection Recorded; and there was produced and read a Copy of the Register Book, sworn to be a true one, and several Affidavits of her Age.

Curia: Let the Inspection be now Recorded; the Issue of her Infancy, may be tried at any time hereafter, tho' she comes of Age.

Nota, A Prisoner in the Kings-Bench that lyes in the Common Side, pays no Fees for his Lodging.

Anonymus.

It was said by Twissden, That if two submit to an Award, this contains not a Reciprocal Promise to perform; but there must be an Express Promise to ground an Action upon.

Nota, A Fine which was set two or three Terms since, was this Term set aside, because of some surreptitious Practice and Misinformation to the Judge.

Auberie *versus* James.

A Sault, Battery and Wounding: The Defendant Justified; for that he being Master of a Ship, commanded the Plaintiff to do some Service in the Ship, which he refusing to do, he moderate castigavit the Plaintiff, prout ei bene licuit.

The Plaintiff maintains his Declaration absque hoc quod moderate castigavit, and Issue was taken thereupon.

*Negativum
infinitum.*

After Verdict for the Plaintiff, it was moved in Arrest of Judgment that the Issue was not well joyned; for non moderate castigavit doth not necessarily imply that he did Beat him at all, and so no direct Traverse to the Defendants Justification, which immoderate castigavit would have been: But, De injuria sua propria absque aliqua tali causa would have been the most formal Repliation.

(* Which
was a mi-
stake.)

But the Justices held, that it would serve as it was, after a Verdict, tho' the Statute at Oxford 16 Car. 2. the last and most aiding Act of Jeofails be * expired, and that de injuria sua propria, not adding absque aliqua tali causa, hath been held good after a Verdict.

Green *versus* Cobit.

Error to Reverse a Judgment, given in the Court at Norwich, in Debt upon a Bond; where the Plaintiff declared, that the Defendant per scriptum suum Obligatorium, at a certain place there became bound, &c.

The Defendant pleaded, that he was in Prison, & scriptum prædictum was obtained by Duress; which was found against the Defendant, and Judgment given accordingly.

The Errors assigned were first, Because he declares of a Writing Obligatory, and doth not say sigillo Defendantis sigillat, 3 Cro. 572. Declaration in Covenant was held Insufficient for the same cause.

Secondly, There is no place where the Defendant alledgeth himself to be in Prison; and being in an Inferiour Court, it will not have any aid of Intendment.

But the Court Over-ruled the first, because the Plea of the Defendant confesses the Deed; and the second, because the Implemment must of necessity refer to the place where the Plaintiff declares the Bond to be made: For the Defendant pleaded, that he was then in Prison; wherefore they affirmed the Judgment, 3 Cro. 55. 2 Cro. 420. 3 Cro. 737. 19 H. 6. 15. 19.

Baldway.

Baldway and Oulton.

DEbe upon a Bond, the Condition was, That the Defendant should pay such Costs as should be stated by two Arbitrators by them chosen.

He pleaded, that none were Stated.

The Plaintiff Replied, That the Defendant did not bring in his Bill.

To which it was Demurred: For tho' if the Defendant were the cause that no Award was made, it was as much a forfeiture of his Bond, as not to perform it would be; yet here there was a precedent as of the Plaintiffs necessary, (viz.) To choose an Arbitrator, which he ought to have shewn before any Fault could be assigned in the Defendant, in not bringing in of his Bill. And to this the Court did incline: Sed Adjournatur.

Nora, It was said, Tho' every Innkeeper may detain an Horse until he is paid for his Beat, yet he cannot sell him; for that was good only by the Custom of London.

Anonymus.

A Custom was alleged in the City of Norwich, That in regard they maintained a Common Key, for the Unlading of such Goods as were brought up the River in Vessels to the said City, that every Vessel passing through the same River, by the said Key, should pay a certain Sum.

It was held a void Custom as to those Vessels which did not unlade at the said Key, nor any other place in the City; there being no benefit redounding to them from the Maintenance of the Key, they only passing by, and were bound for another place, and therefore could have no Imposition upon them: But if they had Received their Freight at the said Key, it might extend to them.

And Coloman said, The last Session of Parliament there was Complaint made against the Governour of Gravesend, who would have prescribed to have Two shillings and Six pence of every Boat that passed by the Fort there: And it was held to be unreasonable.

Anonymus.

TRover and Conversion for a pair of Curtains and Vallence was held Insufficient, for the uncertainty of what was meant by a Pair in this case.

Bernard

Bernard *versus* Bernard.

Error to Reverse a Judgment in the Court of Hull, upon an Assumpsit, where the Plaintiff declared upon two Promises; the first was upon an Indebitatus infra Jurisdictionem Curiz, for Money lent.

The Error assigned was, That the Loan did not appear to be within the Jurisdiction; but upon view of the Record it was adtunc & ibidem.

The other Promise was, That there being Communication between the Plaintiff and Defendant concerning a House, which was said to be at Hull-Bridge, which the Plaintiff sold him, the Money being unpaid, and the Defendant unable; in Consideration that the Plaintiff would release to him the said Debt, he Promised to deliver him up the Possession of the House by a certain Day. Then he Avers, That tho' he Released him, yet the Defendant had not delivered him up the Possession, licet sapius requisitus.

It was assigned for Error, That the House was not expressed to be within the Jurisdiction; for the performance of the Promise must be as well within the Jurisdiction; as the Promise it self: But it is not material, tho' there be other foreign Circumstances in the Case; as Assumpsit upon a Promise to Re-deliver an Horse at Hull, which the Plaintiff lent the Defendant at Hull, to Ride to Beverly: This that Court had Conusans of, tho' Beverly was out of the Jurisdiction. And tho' the House were alledged to be at Hull-bridge, that shall be intended a Vill by it self, and no part of Hull: And of that Opinion was Twisden; but Keeling otherwise.

Another Error was assigned, That there was no Request laid, which ought to have been, being a Collateral thing, (viz) To deliver up Possession of an House.

Sed non allocatur: for being to be done at a time certain, there was no need of Request; but if no time had been set, he would have had time during his Life, unless hastned by Request.

Another Error assigned was, That the Style of Court was, Placita coram Majore, &c. virtute Literarum Patentium, H. 6. yet the issuing out Process, and filling Bail, was Entered secund' consuetud' Cur: And for this 1 Cro. 143. Long and Nethercote's Case was cited, where the same Matter was held to be Error; for the Court being Erected within time of Memory, could have no Custom to warrant their proceedings. Sed non allocatur: for it is according to Law, and the just Course of these Courts.

But Twisden said, If it had been secund' consuetud' Cur' de temps d'ont memorie ne court, it had been Ill.

Girling versus Alders.

In a Prohibition to the Court of the Honour of Eye, the Case was, One Contracted with another for divers parcels of Malr, the Money to be paid for each parcel being under Forty Shillings; and he levied divers Plaints thereupon in the said Court. Wherefore the Court here granted a Prohibition; because tho' they be several Contracts, yet soasmuch as the Plaintiff might have joyned them all in one Action, he ought so to have done, and Sued here, and not put the Defendant to an unnecessary Vexation, no more than he can split an entire Debt into divers, to give the Inferiour Court Jurisdiction in fraudem Legis.

Heskett versus Lee.

Pasch. 21 Car. 2. Rot. 408. Error to Reverse a Common Recovery had in the County Palatine of Lancaster, against an Infant.

The first Error was assigned in a Variance between the Writ and the Count; the Writ was of Lands in Bickerstaffe, and the Count was Bickerstaffe, (5 Rep. 46. Isfeild for Isfeild; but there the Court suffered it to be amended, being the default of the Clerk :) Sed non allocatur, quia idem sonant.

Another Error was assigned in the Entry of the Admission of the Guardian. Which was thus: Concess' est per Cur' quod Johannes Molineux Armig', sequatur pro Thoma Heskett Armig', ut Guardian' prædict' Thoma in p'sito terræ versus Lee: Whereas it was said it should have been, ad comparandum & defendendum, and this is ad sequendum, which is a Form proper only for the Demandant, and so is the 2d Cro. 641. And the Reason why Infants are bound by Recoveries when Guardians are assigned them, is, Because if they suffer any Wrong, they have an Action against the Guardian, in whose default it was: Whereas if the Infant should bring an Action in this Case and declare against Molineux, That he was admitted as Guardian, to defend for him; if Issue were taken upon it by this Record, the Tryal would be against him.

Again, It is sequatur pro Thoma ut Guardianus, and ut is but similitudinary.

Another Error was assigned in the Entry of the Appearance, which was, prædict' Thomas Heskett per præd' Johannem Molineux qui specialiter admissus est per Cur' ad sequend' pro prædict' Tho' venit in propria persona & defendit jus suum: Where it was said, It must be taken that the Tenant appeared in Person, and not the Guardian, and a Recovery suffered by an Infant where he appears by Attorney, or in proper Person, is Erroneous, Rolls 731.

But

But

But notwithstanding these Errors the Court affirmed the Recovery.

For the Admission of the Guardian ad sequend' is proper enough; for it signifies no more than to follow the Cause: And in many Cases the Tenant or Defendant both Prosecute, as in Voucher, praying Tales, carrying down Trials by Proviso, &c. and in Replevin the Avowant is Actor, and in Suffering of a Recovery the Tenant is the main Agent, being to his use if no other be declared. And it was an Error assigned in the Lord Newport and Mildmay's Case, as appeareth by the Record; yet it seems it was taken to be so plain, as not fit to be insisted on: Wherefore there is nothing of it in the Report of the Case 1 Cro. 224. yet there was all endeavour imaginable used to Reverse that Recovery; and divers other Presidents there are of the same manner of Entry: And if it can appear to the Court, that there was a Guardian admitted, the Form of the Entry shall not be so severely Examined, as in the 4 Rep. 53. where there was no Entry of any

Admission of the Guardian by the Court at all; yet it appearing quod venit per Guardianum, the Court would not Reverse the Judgment for Error. And for the Book of the 2 Cro. 641. there were other Reasons which Reversed the Judgment, and the Admission (ad prosequendum) was not mentioned, until the Court upon the other Matters had Resolved the Reversal: And the Books there cited do not at all prove it to be Error. And ad sequend' ut Guardianum is not at all amiss; for Ut many times notes an Identity; Seisicus ut de feodo, makes Conusans ut Ballivus, &c. And for the Entry of the Appearance, it may be taken, that the Guardian came in proper Person, and so it ought to be: But if propria persona refers to the Infant, he must have Reversed the Recovery during his Minority. And so Twisden saith, it hath been resolved in this Court lately. Vid. Roll's 1st Part 171, and 2d Part. 573.

Anonymous.

S Croggs, the King's Serjeant, moved to have a Trial at Bar, in an Indictment of Perjury, and for some further Time, urging that it was the King's Case.

The Chief Justice said, The King was no otherwise concerned in it, than in maintenance of the Common Justice of the Realm: It was usually the Subjects Interest, and His Prosecution, and therefore must not deviate from the Course in Civil Causes, and not to be resembled with Causes wherein the King is concerned in point of Interest.

Anonymous

Anonymus.

A Prohibition was prayed to stay a Suit for Tythes of Wood. The Plaintiff suggested, That he had a House in the Parish, and that the Wood was cut for Fuel burnt in his House.

But the Court said that this would not serve, unless it were expressed, that the House was for maintenance of Husbandry; by reason of which the Parson had Uberiores Decimas.

Barrett *versus* Milward. & al.

A Scire facias was awarded against the Defendants upon a Recognizance, which they entered into as Bail for a Plaintiff in a Writ of Error, that he should prosecute it with effect, or pay the Money if the Judgment were affirmed.

They plead, That he did prosecute it with effect, and that the Judgment was not yet affirmed.

The Plaintiff Replied, Protestando, that they did not prosecute with effect, Pro placito, that the Judgment was affirmed by the Justices of the Common Bench, and Barons of the Coif, Et hoc paratus est verificare per Recordum. To which the Defendants Demurred generally.

Because it was not alledged, That there were Six Justices and Barons present when the Judgment was affirmed: For 27 Eliz. c. 8. which gives them Authority, requires, that there should be Six at the least.

Sed non allocatur: For the Defendant should then have pleaded Nul tiel Record; for if there were not Six, their Proceedings were coram non Iudice.

Nota, If a Certiorari be not Returned, so that an Alias be awarded, the Return must be as upon the first Writ, and the other must be Returned quod ante adventum istius brevis, the Matter was certified.

Gybbons *versus* North.

In an Assumpsit the Plaintiff Declared, That whereas at the Defendants Request he was bound with him in a Bond of 200 l. he in Consideratione inde promised to save him harmless, and obliged himself, his Heirs and Executors in 200 l. to the performance of it; and the Money not being paid, the Defendant did not save him harmless: But, per debitum legis processum, he was forced to pay the Money.

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The Defendant Demurred, because he did not alledge, That he did not pay him 200 l. For obliging of himself in the penalty of 200 l. to save him harmless, He hath election either to save him harmless, or pay 200 l.

But the Court gave Judgment for the Plaintiff; for there is no Election in this case, being no more than an ordinary Promise to Save harmless: And this Action is brought upon the Plaintiffs Dampnification, which is a Breach, and he doth not demand the 200 l. Also a Verbal Contract cannot create a Penalty to oblige the Heir.

Jordan versus Forett.

ERror to Reverse a Judgment given against an Executor in Debt in the Common Pleas, where the Executor pleaded divers Judgments formerly obtained against him; and the last he pleads thus: That one Eliz. H. in eadem Curia implacitasset, &c. and Recovered in Trinity Term, but expresses not in what Year; and there, upon a general Demurrer, Judgment was given for the Plaintiff, and it was assigned for Error,

That this Incertainty in respect of Time, was good at least upon a general Demurrer.

But the Court affirmed the Judgment: For if such Pleading should be allowed, it would be very inconvenient to the Plaintiff, and very difficult to find out the Record, and then how should he plead that it was kept on foot by Fraud, or such like? But if it had been ascertained when the Plea commenced, tho' no time alledged when the Judgment was obtained, yet that would have been good; for the Continuances would have pleased to the finding of it.

Twisden said, That the Course in this Court was a *in Scire facias* upon a Judgment, to say quod cum recuperasset, without alledging any Time: But in the Common Pleas they set forth the Term.

Putt versus Vincent.

IN Debt for 3900 l. the Plaintiff declared upon Articles of Agreement, wherein Putt Covenanted to Convey certain Lands to one Nosworthy; and there are also certain Covenants from Nosworthy to the Plaintiff, and from the Defendant Vincent; who after Imparance pleads, that Nosworthy sealed the Deed, and is still alive.

To which the Plaintiff Demurred.

And it was alledged by Jones, That this being after Imparance, could not be pleaded, it being only in Abatement, and that he Commences his Plea *Actio non*, as if it were a Plea in Bar.

And

And the Court inclined that it was insufficient for both Causes: But then it was said, It appears by the Deed to which Nosworthy was a party, that the Plaintiff could not sue the Defendant alone, and so of his own shewing he could not have Judgment. But it was answered, That it did not appear, that Nosworthy ever Sealed the Deed. Et Adjournatur, Postea.

Gifford versus Perkins.

In Debt upon a Bond entred into to Eliz. Perkins, who was the Plaintiffs Wife, and he as her Administrator brings this Action. The Defendant pleads, That he delivered the Bond to one Eliz. Perkins his Sister, quæ obijt sola & innupta, absque hoc that he delivered it to Elizabeth Perkins the Plaintiffs Wife; And to that the Plaintiff Demurres Specially. For if it be taken that there are two of the name, the Defendant should have pleaded non est factum; for it amounts to no more. Or at least he ought to have induced his Plea, that there were two Elizabeth Perkins. But this Traverse is designed to bring the Marriage in question, which is not to be tried now. Wherefore the Court gave Judgment for the Plaintiff.

Twisden said, If the Issue be, Whether the Wife of such a Man or no? This is to be tried per Pais: For if he be a Wife de facto, it serves upon the Issue: But Loyalty of Matrimony is to be tried by the Certificate of the Bishop only, 2 Cro. 102.

Dightons Case.

A Mandamus was prayed to the Corporation of Stratford super Avon, to restore Dighton the Town Clerk.

They returned their Letters Patents of Incorporation, whereby they had Authority to Grant the Office of Town Clerk Durante bene placito; and that he was amoved from his Office by the Mayor and Burgeses.

It was said, that here appeared no Cause of amoval upon the Return, which was manifestly needless, having Authority to turn them out at their Pleasure. But Twisden said, It hath been held, that where any such like Power is to chuse one into a Judicial Office, as an Alderman, whose place concerns Judicature; that they cannot amove him without Cause: But this was in a Ministerial Office.

It was further moved, That it did not appear, that they had discharged him by any matter in Writing under Seal; and it could not be by Parol. Sed non allocatur; for it is returned to be done by the Mayor and Burgeses; and a Corporation cannot do any thing by Parol. Post.

An

An Executoꝝ obtained Judgment in Debt in this Court, and was afterwards upon an Information here convicted of forging the Will; It was also made void by Sentence in the Ecclesiastical Court. Whereupon the Court was moved to vacate the Judgment, which they ordered accordingly, and the Cause of Vacating thereof to be entred upon the Record. Vide Ante in Paris's Case.

King *versus* Atkins.

In Debt upon a Bond, the Condition recited, That whereas the Plaintiff was Bound with the Defendant being an Excise-Man, that he should render a true Account in the *Exchequer*; that the Defendant should save him harmless at all times, &c. The Defendant pleaded non fuit damnificatus. The Plaintiff replied, That a Scire facias issued out against him, &c. To which the Defendant demurred, because he did not alledge that he gave notice.

This being spoken to divers times, the Court thought notice not requisite in this Case, no more than upon a Promise to pay so much at the others Marriage, or return into England. vid. Hob. 112, 113. 1 Bulst. 12 and 13. Where it is held upon a Promise notice is not necessary, otherwise upon a Bond, because of the penalty. Ante

Chester *versus* Wilson.

TRin. 21 Car. 2. Rot. 498. The Case was two Joynt-tenants, the one Grants Borgains and Sells all his Estate and Interest to the other. It was held clearly by all the Court, That this amounted to a Release; but it must be pleaded quod relaxavit; for one Joynt-tenant cannot grant to another.

Wilson *versus* Armorer.

In Debt against the Heir, upon the Bond of his Ancestor, who pleaded riens per descens; the Jury find a Special Verdict to this effect,

That the Father was seised of a Mannor in Fee, and made a Feoffment of it, excepting two Closes, for the life of the Feoffor only, and refered it to the Judgment of the Court, whether these Closes descended to the Defendant or not. So that the Question was, Whether the Closes were well excepted, or passed by the Feoffment.

And it was argued by Levins for the Plaintiff, That by these words, the two Closes were Totally excepted, and that the Law should reject the latter words; because they cannot take effect according to the Parties intention, to reserve to the Feoffor a particular Estate. If one surrendered a Copphold to the use of J.S. and

and his Heirs, which Estate to begin after his death, adjudged in 2 Rolls 261. a present Fee simple passed, 3 Cro. 344. A Man said to his Son being upon his Land, Stand forth, *Eustace* my Son reserving and Estate for mine and my Wifes Life, I do give you this Land, to you and your Heirs. Resolved there that this is a good feoffment, Moor 950. Popham 49. A Man possessed of a Term in an House in the right of his Wife, granted it, excepting the Cellar, *pro usu suo proprio*, and held that by these words it was altogether excepted out of the grant, 1 Anderson 129.

Serjeant Turner è contra, for that it is but one Sentence, and cited 38 H. 6. 38. An Admorsion was granted, saving the Presentation to the Grants during his life, and held void, and Pl. Com. 156. where it is said, if a Termour granted his Term after his Death, it is void. But if in two Sentences, as to grant his Term, *Habendum* after his Death, there the *Habendum* is only void. *Et Adjurnatur. Postea.*

Love versus Wyndham.

A N Action upon the Case, upon an Issue directed out of Chancery; upon a Special Verdict, the Case was, George Searl being seised of the Mannor of N. Demised the same to Nich. Love for 99 years, if 3 Lives should so long live. N. Love devised it to Dulcibell his Wife, the remainder to Nich. his Son for life, and if he the said N. the Son should dye without Issue, then to Barnaby Love, the Plaintiff. The Executors assented, and whether the Devise to Barnaby were good, was the Question. Jones for the Plaintiff, this is a good possibility. I shall make two points.

First, If a Termor Devise first to one and then to another, whether he may Devise it over.

Secondly, Whether the Limitation here after the Death without Issue, be a good Limitation over.

First, He may make a third Limitation, which is a Possibility upon a Possibility; at least he may make 2 or 3 such Limitations over. I can't certainly say where it will end. It can't be denied, but that a Termour may Devise first to one for life, and after to another, 8 Co. 95. But I say he may go further, and that will appear by Reason and Authority.

First, By Reason. The Reason given, why the Executors Devise in the first case is good, is, because 'tis in Construction of Law, as much as if he had Devised it to the last first, (if the first Man should dye within the Term) and then had Devised, that the first should hold during life; and without such a transposition it cannot be good. Now this being the way of Operation, there is no reason why he may not Devise it to one, after the death of two,

two, as well as after the death of one. This would be so in Grants, were it not that a certainty is required in them, 1 Cro. 155. which is not required in Devises.

Termino Sanctæ Trinitatis, Anno 22 Car. II.

In Banco Regis.

Freeman *versus* Barnes.

Error to Reverse a Judgment in an Ejectione firmæ in the Common Pleas; the Case upon a Special Verdict was thus.

The Marquess of Winchester being seised in Fee of the Lands in Question the 8 of July, 9 Jac. Lets them to Sir An. Mayne for 100 years, in Trust for the Marquess and his Heirs, and to wait upon the Inheritance. The Lessee enters, afterwards the Marquess enters, and Lets it to the Lord Darcy for 7 years, and then Lets to the Spanish Embassador for 7 years, which Leases being expired, Sir A.M. Demises to Freeman for a Term yet unexpired (this Demise is not found to be upon the Land.) Afterwards the Lord Marquess Demises to Germin for 54 years, upon Consideration of Money, and Reserves, a Rent, and Covenants, to Levy a Fine for the assurance of the Term, which was afterwards done with Proclamation. Germin enters, and five years passed without any Claim made; which Lease by mean Assignment came to Wicherly, the Lessor of the Defendant, who was Plaintiff in the Common Pleas, and there had Judgment.

The only Question upon this Special Verdict was, Whether the Fine and Non Claim, should barr the Interest of Sir A.M. the Lessee in Trust.

This Case having been argued three several times at the Bar; The Court did this Term deliver their Opinions, and did all agree, that the Judgment ought to be affirmed.

It was considered quid operatur, by the entry of the Marquess, and they all, except Moreton, held, that Prima facie, he was Tenant at Will, as Littleton Sect. 463. is, where the Feoffor enters upon the Feoffee to his use; but that the Entry of Germin his Lessee did oust Freeman the Assignee of Sir A.M. which Assignment, though not found to be upon the Land, was good, as the Chief Justice held, because the two former Leases made by the Marquess were expired, so he became Tenant at Will again; but then he making of another

ther Lease, and the Lessee entering, this must work an ouster, and so the Fine would bar the Right: for they agreed, that a Fine regularly shall not work upon an Interest which is not divested; though in some Cases it doth, as upon the Interest of a Term, according to *Saffins Case*, 5 Co. which yet cannot be divested; but though the first Entry make but a Tenancy at Will, yet taking upon him to make Leases, that is enough to declare his intent to dispossess his Lessee in Trust. Besides he reserves a Rent, and Covenants for quiet Enjoyment, and to make further assurance, which could not stand with the Interest of the Lessee in Trust: And for the Cases that were objected as *Blunden and Baughs*, 1 Cro. 220. Where it is adjudged, That the Entry of the Lessee for years of Tenant at Will, should be no disseisin, volens volens, to him that had the Freehold, for there was no intention of the Parties to make it so; and here the Law shall rather give the Election to him which had the Inheritance to make it a divesting, than the Lessee; or rather, as the Chief Justice said, the Law construes such Acts to amount to a divesting, or not divesting, as is most agreeable to the intention of the Parties; and the right of the thing which distinguishes it also from the Case of *Powsley and Blackman* cited in *Blunden and Baughs Case*; where the Mortgagee held at the Will of the Mortgagor, and let for years, the Lessee entered, and held notwithstanding, that the Mortgagee might Devest. So Sir Tho. Fishes Case, in *Latches Rep.* Where Tenant for years Lets at Will, and the Lessee makes a Lease for years, and then the remainder is granted over; This Grant is held to be good; which, whether by the remainder there be understood, the interest of the Lessee, or the Fee-simple; yet it is no more than my Lord *Nottinghams Case*, and not like the Case in Question, for there the Lessee held the interest in his own Right, and here but in Trust; and for the Case in *Noyes Reports* 23. *Twisden* said, he wholly rejected, that Authority; for it was but an Abjdgment of Cases by Serjeant *Size*, who when he was a Student borrowed *Noyes Reports*, and abridged them for his own use.

The Case was this; Tenant in fee makes a Lease for years, then Levies a Fine before Entry of the Lessee: It is held there, though five years pass the Lessee is not barred, which is directly against the Resolution of *Saffins Case*; and for Authority in this Case, they relied upon the Case of *Isham and Morris*, in 1 Cro. 781. Where upon Evidence it was resolved by the Justices, That if the cestuy quo Trust of a Lease for years, Purchaseth the Inheritance, and Occupies the Land, and Levies a Fine, that this after five years shall bar the Term, which is not so strong as this Case; because there were no Leases made, and Entry thereupon; and the Trust must pass inclusively by the Fine, as is re-

solved in divers Books; especially in this Case, where it is to wait upon the Inheritance, which though it arises but out of a Term, yet it shall follow the Land, and go to the Heir.

And for the inconveniences which were objected, That if any Man purchased Land by Fine, that he could not keep on foot Mortgages and Leases, which it is often convenient to do. The Chief Justice declared his Opinion, That in that Case the Fine should not bar, there not being any intention of the Parties to that purpose.

And as to the other, that where the Mortgagee continuing in Possession, Levies a Fine, this should bar the Mortgagee; he denied that also, and grounded himself upon Fermours Case, in 3 Cro. And Twisden agreed.

Dighton's Case.

HE brought a Mandamus to be restored to his place of Town Clerk of Stratford super Avon. The Corporation returned Letters Patents, whereby they were empowered to chuse one into the Office of Town Clerk, Durante bene placito, and that they removed him from his Office.

Jones prayed that he might be restored notwithstanding, because no Cause of his removal was returned, nor that they had ever Summoned him, whereas if they had, he might peradventure have shewed such Reasons as would have moved them to have continued him; and he cited Warrens Case, 2 Cro. 540. who was restored to his Aldermanship, where the Return was as here.

But the Court held, that they could not in this Case, (although they confessed they knew the Merits of the Person) help him. And the Chief Justice said, The Case of the Alderman differed, for he is a part of the Corporation, which is a continuing Body, and no Member thereof can be displaced at the will of the rest; but it is otherwise in Case of such an Office as this; the Cases cited agree, if it had been a Common Council Man, as was returned at first.

And here they said it were fit a Scire facias went out of Chancery, to Repeal these Letters Patents as unreasonable. If they had been to chuse a Town Clerk generally, it had been for his life; or if to chuse one, provided they might turn him out at their Will and Pleasure; yet they could not have done so without Cause, as Twisden said: But here the Authority is absolute, to chuse him Durante bene placito, which it was said was not so much to be admired at, for the Offices of Judicature in the Courts at Westminster are so determinable.

Foot *versus* Berkley.

Paf. 19. Car. 2. Rot. 1618. In a Writ of Error to Reverse a Judgment, given in an Ejectione firmæ in C. Banco. The Case upon a Special Verdict was this; The Prior of Bodmin was seized in fee, and 29 H. 8. demised to John Monday and others for 96 years, at the Rent of 60 l. per annum.

The Possessions of the Priory afterwards came to the Crown, and descended to Queen Eliz. Who in the 42 year of her Reign granted to John Monday for 30 years, Habendum after the end of the former Term, under the same yearly Rent. The Inheritance was afterwards conveyed to divers in Trust for the late Queen Mother; who in 14 Car. 1. demised to Francis Godolphin in this manner, reciting that Queen Eliz. in the 32 year of her Reign, (whereas it was the 42) demised to J.M. (and did not recite for what Term) to Commence after the Expiration of the Term for 96 years, granted by the Priour, reserving 60 l. Rent, did Demise to the said Francis for 21 years, to Commence after the end of the Term granted, by the said recited Letters Patents of Queen Eliz. They find no Lease made in the 32 year of the Queen, &c. Now whether Godolphins Lease should begin from the making, (which if it should, it is for some years expired,) or to expect while the Lease made in 42 Eliz. should determine, was the sole Question.

And by the Opinion of the Court of Common-Pleas, (Tyrrel only to the contrary,) It was adjudged, That the Lease should Commence presently upon the making: And a Writ of Error being brought, after divers Arguments at Bar, it was this Term argued by the Court, And resolved, that the Judgment should be affirmed.

They held that every Lease for years must have a certain beginning and a certain end, either expressed, or referred to something which may make it so: And here it is referred to a Lease, whereas there is not any such Lease, therefore it is to begin presently; as if it had been to Commence from an impossible date, Co. Litt. 46. B. A Lease made from the 30 of February shall Commence presently; and it is the same thing, when to begin from the end of a Lease misrecited, for it is no more than to refer it to nothing, Br. Leases 62. 1 Cro. 220. Miller and Johns Case, Dier 116. 2 Roll 55. 4 Rep. 53. Palmers Case, Bendlowes Rep. 35. 1 Anderson 3. Leonard Mounts Case. And whereas it was objected in this Case, That the Date is not material, and that there was enough expressed, to ascertain what Lease the Parties intended; and the Case in Hob. 129. was cited, Where one made a Lease, Habendum a festo purificationis, and then reciting by his Deed, that he had made

a Lease to Commence à festo Annuntiationis, granted the said Reversion; The Court held this there a good Grant.

It was answered, That the Lease here was tied up by such precise words, to begin upon the Determination of the Lease granted by the said recited Letters Patents, that this cannot be referred to a Lease which varies in the Date, though agreeing in other Circumstances; (yet the certainty of the Term is not recited neither,) And though a Lease is good without a Date; yet when a Lease is recited to be of one Date, a Lease which bears another Date cannot be said to be the said recited Lease. And the Case in Hobart is very different from this Case; for in the Grant of the Reversion, the misrecital of the particular Estate is not material in the case of a common person, so long as he hath a Reversion in him: But here one Term is recited to give a certainty of Commencement to another; and if here be none such, it must begin presently; so that however, the Grant is good also here, either to pass the Reversion with Attornment, or being by Indenture to take effect, upon the forfeiture, &c. of the former Term, Pl. Com. 431.

Twicken said, Walter Chief Baron reported, this Case to be adjudged, where one made a Lease to begin from the Nativity of our Lord last past, It was resolved it should begin presently, and not from Christmas, for that was the feast of the Nativity; and to take it from the Nativity, the time would have been efflured many times over, and that in the Kings Case, such a Lease would be void. But here, if the Case were thus, that A. had made a Lease to B. for 30 years, to Commence from the 1st of March, and then A. reciting the former Lease to be made the 1st of May for 30 years, had made another Lease, to Commence from the end of B's Lease; the Lease should have Commenced after the former ended. But it cannot be so in the Case in Question, Because tied up to the said recited Deed.

Another Objection was, Because this being by Indenture, the Parties should be stopped to say, that there was no such Lease; and this was much insisted on by Serjeant Maynard, in his Argument for the Plaintiff.

To which it was answered, That this being by Recital, could work no Estoppel.

Again, The Question is not now between the Parties to the Lease; and though they and their Assignees might be bound in pleading; yet being in a Special Verdict, the Court shall judge according to the Truth. And so is Isham and Morrice's Case, 1 Cro. 77. And Rawlins Case, 4 Rep. is between the Parties themselves. So they all resolved, that Judgment should be affirmed.

The

The King *versus* Bates.

ERror to Reverse a Judgment given in an Information at the Assizes in Norwich, because the Information was Exhibited before Justice Moreton and Justice Rainsford; and the Trial and Judgment was at the next Assizes before two other Judges.

And it was Objected by Pemberton, That their Commission of Oyer and Terminer doth not empower them to determine any thing which was not Commenced before them; and so is Bro. tit. Commission 24. And in the 4th Inst. my Lord Coke saith, that the Statute of Edward the 6th extends only to Justices of Gaol-delivery; sed non allocatur.

For the Court said, the Statute extends to both; and so hath been the constant Practice.

Secondly, There was no good Trial; for there is an Award of a Venire facias, but no Writ certified. But this was also Overruled; for it is the Course of the Assizes not to make out any Writ.

Thirdly, Issue is joyned by the Clerk of Assize, which the Court said ought to be; for he is Attorney General there.

Parker *versus* Welby.

The Plaintiff brought an Action upon the Case against the Defendant, and Declared, that he sued out a Latitat against a third Person, directed to the Defendant, being Sheriff; who thereupon Arrested him, and after let him go at large: And then he Returned a Capi Corpus & paratum habuit, ubi revera, he had not his Body at the Day.

To this Declaration the Defendant Demurred, supposing that no Action would lye for this False Return; for the Statute of 23 H. 6. obliges the Sheriff to let to Bail; and if he hath not the Body at the Day, he is to be amerced.

But the Court were of Opinion for the Plaintiff: For it shall be intended that he let him go without Bail; and if he did not, he ought to have pleaded the Statute of 23 H. 6. which is a Private Law: And at the Common Law a man could not be let at large in such case, without a Homine Replegiando.

Or else he might have pleaded Not Guilty, and given the Statute in Evidence: And so it is Adjudged in Layton and Gardiner's Case, 3 Cro. 460. So Moor placito 996. 2 Cro. 352. and 3 Cro. 624. Where the Defendant pleaded, That he let to Bail according to the Statute; and the Plaintiff was barred.

Twissden

Twisden cited a Case in this Court, Pasche 21 Car. 1. Rot. 616. between Franklyn and Andrews; where the Plaintiff Declared, as in this Case. And the Defendant pleaded the Statute, and that he let him at large upon Sureties, and traversed absque hoc, that he returned his Writ Aliter aut alio modo: To which the Plaintiff Demurred.

It was Resolved,

First, That the Sheriff could Return nothing but Capi Corpus: And he was then amerced, because he offered to make a Special Return.

Secondly, That where the Sheriff let the parties out to Bail, and he made such Return; that it was no False Return, and therefore he should not have traversed Absque hoc, that he Returned Aliter vel alio modo: As in Maintenance, where the Defendant Justifies, so that the party could not speak English, and therefore he went with him to instruct his Counsel: He shall traverse Absque hoc, that he maintained Aliter; because that he maintained [Would not do,] tho' it be justifiable. So in that case the Court ordered it to be Entred upon the Roll, that Judgment was given for the Plaintiff quia Traversia fuit mala.

So here they Ordered it to be Entred, because the Defendant did not plead the Statute of 23 H. 6.

Hocking *versus* Matthews.

AN ACTION upon the Case was brought for Maliciously Impleading, and causing him to be Excommunicated in the Ecclesiastical Court; whereby he was taken upon an Excom' Cap', and Impzisoned, until he got himself absolved.

The Defendant pleaded Not Guilty, and found against him: And it was afterwards moved in Arrest of Judgment, that the Declaration was not good; for no Action will lye for suing a man in the Spiritual Court, tho' without cause, no more than in suing in the Temporal Courts. For Fitz. N. B. is, That a man shall not be punished for bringing the Kings Writs. So Hob. Waterer and Freeman's Case. And it hath been lately held, that no Action will lye for an Indictment of Trespass, tho' false; but an Action of the Case will lye for suing in Court Christian for a Temporal Cause.

But the Court in this Cause gave Judgment for the Plaintiff: For tho' in an Action between party and party in the Ecclesiastical Court; where (if the matter goes for the Defendant) he shall have his Costs, no Action will lye if the Court hath Jurisdiction: Yet where there is a Citation ex Officio, and that is prosecuted maliciously without ground, the Party shall have his Action; for in such Suit he can have no Costs: And so is Carlson and Mills's

Mills's Case Adjudged, 1 Cro. 291. And this shall be so intended after the Verdict, or otherwise the Defendant should have shewed it to be otherwise, and Justified. And Rainsford said, without Cause, shall be understood, without any Libel or Legal Proceedings against him.

Anonymus.

In Debt upon an Obligation to perform an Award; which was to pay the Rent mentioned in such an Indenture: He that pleads performance of this Award, needs not set forth the Indenture, but refer generally to it: But if it be to be paid in such manner, and at such times as is expressed in the Indenture, then it must be set forth at large.

The like of an Award of payment of Money given by a Will.

Wilson versus Armorer.

The Case was Argued again this Term by Coleman for the Plaintiff, who Argued, that the Exception takes the two Closes wholly out of the Grant, and that no modification can be annexed to it, 3 Cro. 657. and Moor Pl. 747. A Lease was made for certain Lands, excepting a Close, and Covenants were for quiet Enjoyment of the Premises. The Lessee disturbed the Plaintiffs possession in the Close excepted, yet he could not bring a Writ of Covenant; for by the Exception it is as much as if it had been never mentioned; and in this Case the Livery being secundum formam Chartæ, could not work upon these Closes. The Case of Hodge and Cross; cited in Hob. 171. was this: A man gave Lands to another, Habendum to him and his Heirs after the death of the Feoffor, and Livery secundum formam Chartæ: Resolved a void Feoffment, and relied upon the Case in 1 Anderson 129. as full in the Point, A Lease of an House, excepting a Chamber pro usu suo proprio & occupatione: It was held, that he might assign.

Weston è contra. This Exception is altogether void; for it cannot be for the Life of the Feoffor only, Bro. tit. Reservation 13. and it shall not except the whole fee against the Intention of the Parties; for then the Ill wording of his Exception should give him above twice as much as otherwise he should have had; and it is but one entire Sentence, and taking it altogether it must have an effect, which the Law doth not admit, and is therefore to be wholly rejected: As where a man grants his Term after his death, the Grant is void. Otherwise where he grants his Term habendum after his death; for there the last Sentence is rejected, Hob. 171. The Case of the Exception of the Chamber is not alike; for excepting it for his own use, are apt words to give him power to dispose of it at his pleasure.

Keeling,

Keeling, Rainsford and Moreton held the Exception good for the entire Fee.

Twisden, That it was wholly void, because one Sentence. Plus Postea.

Sympson versus Quinley.

TRin. 20 Car. 2. Rot. 719. A Custom, that Lands should descend always to the Heirs Males, (*viz.*) To the Males in the Collateral Line, excluding Females in the Lineal, was held good. Which it was said was allowed anciently in the Marches of Scotland, in order to the Defence of the Realm, which was there most to be looked to; tho' it is said in Davis's Reports, That the Custom of Gavelkind, which was pretended in Ireland and Wales, to divide only between Males, was naught. But the former Custom was adjudged good in this Court, Hill. 18 Car. 2. Rot. 718.

Foot versus Berkly.

Berkly had Judgment in an Ejectment in Communi Banco, and Execution of his Damages and Costs: Foot brings Error, and the Judgment is affirmed. Whereupon Berkly prays his Costs for his delay and charges; but could not have them.

For no Costs were in such case at the Common Law, and the Statute of 3 H. 7. cap. 10. gives them only where Error is brought in delay of Execution; so 19 H. 7. cap. 20. And here, tho' he had not Execution of the Term, yet he had it of his Costs.

If one hath Judgment in a Formedon in Remainder, and before Execution the Tenant brings Error, the Judgment is affirmed; yet he shall pay no Costs, because none were recoverable at first, 1 Cro. Ante.

Weyman versus Smith.

A Prohibition was prayed to the Mayor and Court of Bristol, suggesting, that a Plaint was Entered there for 66 l. and that the Cause of Action arose in London, and not in Bristol, and so out of their Jurisdiction.

Note, An Affidavit was also made thereof, and this is upon Westm. cap. 35. and so is F.N.B. 45. Unless the party pleading in Bar, or Imparling, admits the Jurisdiction of the Court, 2 Inst.

Tarlour and Rous versus Parner.

An Account brought by the Plaintiffs, as Churchwardens, against the Defendant the former Churchwarden, for a Bell, &c.

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The Defendant pleads, That it lacked mending, and that by the Assent of the Parishioners it was delivered to a Bell Founder, who kept it until he should be paid. To which the Plaintiff Demurred.

For this Plea is no bar of the Account, but a good Discharge before Auditors. But it was said on the other side, That the Matter pleaded shewed that the Defendant was never Accountable, therefore it might be in Bar. The contrary whereof is Adjudged in the same Case in terminis, 1 Rolls 121. between Methold and Wyn; and so was the Opinion of the Court here.

But then it was alleged, that the Declaration was not good, for there were two Plaintiffs, and yet it is quod reddat ei compotum, and it is de bonis Ecclesie; whereas it should have been, bonis Parochianorum.

For the first, the Court said that it should be amended; for it was the default of the Clerk.

But the other was doubtful: For the Presidents were affirmed to be both ways; but they rather inclined, that the Declaration was not good for that cause.

Anonymus.

A Judgment of Forcible Entry in unum Messuagium vel domum Mansional, (quare, if not uncertain) and other Lanes and Tenements, tenet ad voluntat' Dom' secundum consuetudinem Manerii, and doth not express what Estate.

For which the Court held, it ought to be quashed; for the Statutes 8 H. 6. and R. 2. extend only to Freeholds, and the Statute in King James's time, to Leases for years and Copyholds. And here, tho' he saith, at the Will of the Lord, according to the Custom of the Mannor; yet 'tis not sufficient, because he saith not, by Copy of Court Roll. And it was Adjudged in 1653, in this Court, that none of the Statutes extended to Tenants at Will.

Marryn versus Delboe.

In an Assumpsit the Plaintiff Declared, That he was a Merchant, and the Defendant being also a Merchant, was Indebted to him in 1300 l. And a Communication being had between them of this Debt, the Defendant promised him in Consideration thereof, That he should have Share to the Value of his said Debt, in a Ship of the Defendants, which was then bound for the Barbadoes; and that upon the Return of the Ship he would give him a true Account, and pay him his proportion. And sets forth, That the Ship did go the said Voyage, and returned to London; and that after the Defendant, with some other Owners, had made an account of

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the Merchandize returned in the said Ship, which amounted to 9000 l. and that the Plaintiffs Share thereof came to 1700 l. which he had demanded of the Defendant, and he refused to pay it, &c.

To this the Defendant pleads the Statute of Limitations, and the Plaintiff Demurred.

Alledging, that this Action was grounded upon Merchants Accounts, which were excepted out of the Statute. Tho' if an Action be brought for a Debt, upon an Account stated between Merchants, the Statute is pleadable, as was Adjudged in this Court last Hillary Term, between Webber and Perit; yet here there being no Account ever stated between the Plaintiff and Defendant, it is directly within the Statute: And of that Opinion were Keeling and Rainsford.

But Twifden inclined otherwise, because the Plaintiff declares upon an Account stated, and tho' between Strangers, yet he bringing his Action upon it admits it. *Et Adjournatur.*

Nota, Every Parish of Common Right ought to Repair the High-ways, and no Agreement with any person whatever can take off this Charge which the Law lays upon them.

Crispe and Jackson versus The Mayor and Commonalty of Berwick.

In Covenant, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that there was a Mis-Trial, the Venire being awarded to an adjoining County: Which the Court, after Hearing of Arguments in it, Ruled it to be well enough; but one of the Plaintiffs died before the Court had delibered their Opinions.

It is prayed notwithstanding, that Judgment might be Entred, there be no default in the Plaintiffs; but a delay which came by the act of the Court; and that it was within the Statute of this King, That the death of the Party between Verdict and Judgment should not abate the Action, and that it was in the discretion of the Court, whether they would take notice of the Death in this case; for the Defendant hath no Day in Court to plead, there being no Continuances entred after the Return of the *Postea*, 1 Leon. 187. *Isley's Case* Latches Rep. 92. And the Court were of Opinion, that Judgment ought to be Entred, and there being no Continuances, it may be as if immediately upon the Return of the *Postea*. Ante.

Lion versus Carew.

The Case was: A Lease was made to two for 99 years, if three Lives should so long live, and this to commence after the end of a Lease for Life, Reddend' a certain yearly Rent, and two Week-days in Harvest, post principium inde, & reddend' inde 3 l. nom' Harriotte, post mortem of the Lessees, or either of them, and reddend' two Capons at Christmas, post principium inde. One of the Lessees died before the Lease for Life determined, whereupon the Lessor brings Covenant for the 3 l. and sets forth this Matter in the Declaration.

To which the Defendant Demurred, supposing that the 3 l. was not to be paid unless the Death had hapned after the Term had commenced. And the Court having heard it spoken to divers times by Counsel on both sides, by the Opinion of Twisden, Rainsford and Moreton, Judgment was given for the Defendant.

For all the other Reservations but this were expressly post principium termini, and Clauses in Companies are to expound one another, as it is said in the Earl of Clanrickard's Case in Hobart. It is in the nature of a Rent and Reservation, which it is not necessary that it should be Annual. And in Randall and Scories Case, 1 Cro. such a Duty was distrained for, and it shall attend the Reversion, Rolls 457. And he that hath but an interesse termini, is not to pay the Rent reserved; for there is no Term, nor no Reversion, until it commences.

If A. lets to B. for 10 years, and B. redemises to A. for 6 years, to commence in futuro; in the mean time this works no suspension of either Rent or Condition. The Intention of the Parties is to be taken, That it should not be paid until then. However, Reservations are to be taken most strongly against the Reserver: As Palmer and Prowles Case, cited in Suffield's Case, 10 Co. is: The Reversion of a Lease for years was granted for Life, reserving certain Rent cum reversione acciderit; a Distress was made for the Rent arrear ever since the Grant.

Resolved, that it was good for no more than was incurred since it fell into possession.

Keeling Chief Justice held strongly to the contrary: For he said the words were so express in this Case, that they have left no place for Construction, which other Clauses of the Intention of the Parties may direct, when the Expression is doubtful. He took it for a Sum in gross; for Distrained for, it could not be being reserved upon the Death of the Lessees, or either of them; which was also the limitation of their Lease: And that Interpretations were not to be made against the plain sense of words.

He relied upon Edriches Case, 5 Co. where the Judges said, They would not make any Construction against the expresse Letter of the Statute; yet there was much Equiry in that Case to incline them to it. And he said, As well as a Fine is paid upon the taking of such Lease before it begins, why may not something be paid also when their Interest determines? And in some Countries they call such Payments, A fair Leave.

Miller *versus* Ward.

Trespas for breaking of his Close on the 1st of August; and putting in his Cattel. The Defendant Justifies for Common, which he prescribes for in this manner; (viz.) That two years together he used to have Common there, after the Corn reaped and carried away until it was sown again, and the Third year to have Common for the whole year; and that that Year the Plaintiff declares for the Trespas was one of the years the Field was own, & *quod post grana messa, &c.* he put in his Cattle, *absque hoc* that he put them in *aliter vel alio modo*.

The Plaintiff Demurs, which it was Ruled he might; for the Defendant doth not answer to the Time wherein the Trespas was alledged; and the Traverse will not help it; for *aliter vel alio modo* doth not refer to the time.

Anonymus.

An Administrator brings Debt upon an Obligation. The Defendant pleads payment to himself. Upon which it was found for the Defendant.

Coleman prayed that he might have Costs: As where an Executor brings an Action for Trover and Conversion in his own time, and found against him; it was Ruled in Atkyes Case, 1 Cro. that he should pay Costs; and here of his own knowledge he had no cause of Action, the Money being paid to himself.

But the Court Resolved, That there ought to be no Costs in this Case; for the Action of Trover in his own time might have been brought in his own Name, so it was needless to name himself Executor or Administrator; but the Action here is meerly in right of the Intestate.

Harvey *versus* James.

After Verdict at the Assizes, the Clerk delivered the Postea to the Attorney, by whose negligent keeping it came to be eaten with Rats. But the Court Examining the Clerk of Assize, it appeared that he had Entred the Jurors Names, Verdict and
Tales

Tales in his Book, and according to that, the Court suffered the Verdict to be entered on Record.

Anonymus.

IN an Action of Battery against Baron and Feme, the Jury find the Feme only Guilty and not the Baron.

It was moved in Arrest of Judgment, That this Verdict was against the Plaintiff; for he ought in this Case to have joyned the Baron only for conformity, and he declaring of a Battery by both, the Baron being acquitted, he hath failed of his Action; and so is Yelverton 106. in Drury and Detinys Case.

But here the Court gave Judgment for the Plaintiff, and said that that in Yelverton was a strange Opinion.

Anonymus.

A Certiorari was prayed to remove an Indictment of Manslaughter out of Wales; which the Court at first doubted, whether they might grant, in regard it could not be tried in an English County: But an Indictment might have been found there, of in an English County, and that might be tried by 26 H. 8. cap. 6. vid. 1 Cro. Soutley and Prices Case, and Chedleys Case.

But it was made appear to the Court, That there was a great cause to suspect Partiality, if the Tryal proceeded in Wales; for the Party was Bailed already, by the Justices of Peace there, (which Twisden said it was doubtful, whether they had power to do for Manslaughter.) They awarded a Certiorari, and took Order, that the Prosecutor should be bound by Recognizance to present an Indictment in the next English County.

Collet *versus* Padwell.

IN Debt upon a Bond to perform an Award, which was; That one should make a Lease to another before the 21 of October, which was 2 or 3 Months after the Award, and that the other upon the making of the Lease, should pay him 50 l.

The Question was, Whether notice in this Case ought to be given, when he would make the Lease; for otherwise it was said, the other must have 50 l. always about him, or be in danger to break the Award.

And it was resolved by the Court, That no notice was necessary.

Noell

Noell *versus* Nelson.

MIch. 21. Car. 2. Rot. 745. Error to Reverse a Judgment given in the Common Pleas, where the case was thus. Nelson brings Debt against Noel, as Executor of Sir Martyn Noel, who pleads plene administravit. The Plaintiff confesseth the Plea, and prayeth Judgment, de bonis Testatoris quæ in futuro ad manus Defendentis deveniunt; and upon a Suggestion of Assets afterwards, he had a Scire facias against Noell, and Judgment thereupon.

Noell brings a Writ of Error, and assigned it in this, that the Plaintiff confessing the Plea of fully Administrated, ought to have been barred.

And it was argued by Wynnington for the Plaintiff, and Symson for the Defendant.

Wynnington, Where an Executor pleads falsely or deceitfully, Judgment is to be given against him; as upon ne unques Administrator come Executor, Judgment shall be de bonis propriis: But where he pleads truly, it is Reason the Plaintiff should be barred; and the Plaintiff confessing his Plea, it is as strong as if found by a Jury, or rather more; for Verdicts may be false, and therefore Attaints are provided; and such express confession as here is, is much stronger than an implied Confession sur Demurrer. Indeed if upon plene Administravit Assets are found for part of the Debt, Judgment shall be for the whole, 8 Rep. 134. Shipley's Case, Because the Plea was false: But if an Executor should be liable to be Sued, and have Judgment given against him when he had fully administrated, it would put a great inconvenience upon him, as to be put to charge to defend the Suit, and to be in Misericordia.

And whereas it was objected, That if the Plaintiff should be barred in such Case, he would yet have no advantage by Commencing his Suit, of having his Debt paid before other Debts in pari gradu; he answered, this inconvenience is not to be matched with that, that the Executor should be liable to; besides the Law will ever favour the Executor; for if an Executor be Sued, and the Plaintiff Nonsuit, he shall have Costs; but an Executor Plaintiff shall pay no Costs upon a Nonsuit. 3 Cro. 503. vid. Hob. 83. Lawneys Case. Also a Man may be presumed to know whether an Executor hath Assets or no, for he may consult the Inventory.

And for the Cases that might be objected, as that of the Warrantia Chartæ against an Heir, who pleads Riens per descent, or that the Plaintiff is not impleaded, the Plaintiff may pray Judgment presently, F. N. B. 134

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He Answered 'tis true, the Writ may be brought quia timer, for he may be after impleaded in an Action wherein he cannot Vouch; yet if he be after impleaded in a Præcipe he must Vouch, and this is a fine real; and the Heir merely in loco patris; whereas, when an Executor hath fully Administred, the Executorship is as it were determined. And for the Case where Debt is brought against the Heir, who Pleads riens per descent; the Plaintiff may pray Judgment presently, to have Execution of Assets, as shall afterwards descend, he said he knew no particular Authority where it was so done; but if it be so as it is said in Shipleys Case, yet not to be resembled to this Case; for the Heir is charged as for his own Debt, and the Action is in the Deber, & Detinet, Com. 443. and if the Heir Pleads riens per descent, and found against him, the Judgment is general, not so of an Executor; so where the Judgment is, sur nihil dicit, Moor 522. Dier 81. 344. 2 Rolls 67. Tit. Heir, so where he confesses the Action; but if an Executor after pleading Plene Administrevit confesses the Action, the Judgment shall be de bonis Testatoris, Hob. 178. And for the Opinion in Shipleys Case, 8 Rep. which is according to the Judgment here, he said it was obiter; but he relied upon Cro. Dorchester and Webbs Case; where that Opinion is denied, and said there, that all the Presidents are, that the Plaintiff is in such case to be barred, Rastals Entries, 323, 324.

Sympton contra, The nature of the Plea is to be considered, it doth not deny the Cause of Action, but goes only to take away the present effect of it; remoto impedimento resurgit Actio vel Executio, 34 H. 6. 23. Prisor saith, If an Executor Pleads ne unques Executor, and found against him, Judgment is to be de bonis propriis. But otherwise, If he Pleads Plene Administrevit, for then he doth not put the Party from his Action for ever. He said the Case of the Action of Debt against the Heir was the same, for he is bound only by reason of the Land descended, 1 Rolls 929. If an Executor Pleads Plene Administrevit, and the Plaintiff takes Issue, and found against him, he is to be barred, for he (as the Book saith) hath waived his advantage; he cited also the Book of the Office of Executors, (supposed to be written by Doderidge) lib. 7. cap. 15. and relied principally upon Shipleys Case, 3 Cro. 887. 8 Co. 134. which is cited and allowed in Hob. 199. And upon a President in this Court, Trin. 13 Jac. Rot. 1104. between Perryman and Westwood, where Judgment was just as in this Case, and Mich. after Rot. 206. Upon Suggestion of Assets, a Scire facias was taken out, and Issue taken and tried at Guild-hall, before my Lord Coke; where Assets were found for part, and Judgment to Recover so much, and the residue if Assets should come after; which as to the latter Judgment, was somewhat further than the principal Case.

Keeling

Keeling, Rainsford and Moreton, Held clearly, That Judgment ought to be affirmed, chiefly for the great inconvenience it would be to one that had Commenced an Action, and yet his Debt should have no preference before others of the same sort; and many times the Testator leaves a great Estate in Bonds and Specialties, which yet are no Assets until the Money is paid: Whereas the Case of the Heir is much stronger, in regard of the improbability of his having Assets in futuro.

In 16 H. 7. 10. it is said, if an Executor Pleads Plene Administravit, it is but a Temporal bar. A Rent is granted in Fee, provided that it shall cease during the minority of the Heir, the Wife brings Dower, the Heir being under Age, she shall have Judgment, sed cesset Executio.

Vid. *Hutton*
128. the
case repor-
ted without
any such O-
pinion.

Twisden stuck much to the Authority of *Dorchester* and *Webbs* Case, but at length consented, that Judgment should be affirmed.

Note, The Judgment was in *Misericordia*, and the Court doubted at first, whether it were not Erroneous for that Cause; but it appeared, that the Executor did not come in *primo die*, wherefore notwithstanding they affirmed the Judgment. Ante.

Termino Sancti Michaelis, Anno 22 Car. II. In Banco Regis.

Prydyerd versus Thomas.

A Writ of Error was brought upon two Judgments, given in an inferior Court, and they returned two Records between the same Parties, but it seems not those which the Plaintiff intended, and this was complained of to the Court; and it appeared, that those which the Plaintiff brought his Writ of Error upon, were not determined, for Writs of Enquiry of Damages were returned, but no Judgments entered.

Curia, If there be divers Records between the same Parties, the inferior Court may remove which they please, they being warranted by the Writ so to do; and if Judgment be given after the Teste, and before the Return of the Writ of Error, the Record shall be removed; but if Judgment be entered after the Writ is returnable, the Writ is only to be returned, and that no Judgment is yet given; and here was an omission in the Plaintiff, that he did not lie that Judgment was entered; for after a Writ of Enquiry of Damages returned, the Court is to give Judgment at the prayer of either Party, and not without.

Note,

Note, If the Record vary from the Writ of Error, yet the Inferiour Court ought to remove it.

The King versus Ledgingham.

In an Information against him for the King, the Court took a privy Verdict, and so it was said was the usual course at the Assizes. But it cannot be so in case of Felony and Treason, as is said in the 1 Inst. 227. b.

In cases of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them, so they may give their Verdict out of the County.

Polus versus Henstock.

In Trespas for impounding of 11 Oxen. The Defendant Pleads, That Sir H. Vernon was seized of a Close called the Cowes Lesowe in Fee, and Let it to him for 99 years; and that the Cattel came upon the Close, and so justifies for Damage Feasant.

The Plaintiff Replies, confessing Sir H. V's Estate, and the Lease and saith, that Sir H. V. was seized of another Close adjoining, called Browns Close, and alledges a Custom in Peplow, (in which Town both the Closes are;) that all the Occupiers of the Cowes Lesowe had maintained a fence against Bowmers, and that the Cattel came upon the Land in default of a fence, &c. and Issue taken upon the Custom, and found for the Plaintiff.

It was moved in Arrest of Judgment. First, That this was in the nature of a Prescription, and not of a Custom; for a Custom cannot be laid in a Ville, and applied to a particular place, or Inhabitant therein, unless in case of a Coppyholder; where it is necessary, in regard he cannot prescribe 4 Co. 113.

Secondly, If it had been alledged by way of Prescription, it should be laid in him that had the Inheritance. And if it be objected, that it is hard to oblige a Stranger to discover that; then it ought to be alledged quod omnes Tenentes; but not as it is here, omnes Occupatores, 1 Cro. Baker and Breremans Case.

Thirdly, By the Unity this Duty of Fencing is extinguished, and shall not revive though the Closes come after into several Hands. In Dier 295. b. it is left a Quare. But in Popham 172, it is clearly held so, where it is said, things of necessity shall revive, as a Way to Market or Church; but not so of Easements, 1 Cro. Baker and Breremans Case.

And of this Opinion were the Court.

Jones *versus* Powell.

The Plaintiff declared that he was an Attorney, and the Defendant to Scandalize him in his Profession said of him, That he could not read a Declaration; By reason of which many of his Clients left him. And the Opinion of the Court inclined against the Plaintiff.

For the Allegation of Special Damages will not maintain the Action, unless the words import some Slander, which these did not, unless brought in by some words precedent, touching his knowledge in his Profession; for the Declaration might be so written, that he might not be able to read it, without any Imputation of Ignorance.

Sard *versus* Ford.

Mich. 21. Car. 2. In an Action upon the Case the Plaintiff declared, That he was seized of the Mannor of Newton Abbot, and that he, &c. had kept a Market there every Wednesday, and used to have the profits of Stallage, &c.

That the Defendant had erected a new Market, at a place 7 miles distant from the Plaintiffs, held every Tuesday, &c.

Jones excepted to this Declaration, for that it could not be to the hindrance of the Plaintiff's Market which was 7 miles off, and kept upon another day, 22 H. 6. 14. 2 Rolls 140. It appears that an Action was brought against one that levied a Market not above 5 miles distant, and upon the same day.

Curia contra, The Writ of ad quod damnum doth not express the Market to be erected the same day, and notwithstanding it will hinder recourse to the other Market.

Anonymus.

A Dean and Chapter made a Lease of Tythes for years; the Lessee assigned over his Interest, and afterwards the Dean and Chapter bring Debt against him for the Rent: Who Pleads, That the Plaintiffs accepted the Rent, due since the Assignment from the Assignee, to which the Plaintiffs Demurr.

Jones, This is no Rent, but a meer Sum in gross due upon the Contract, therefore in the 5 Rep. in Jewells Case it appears, that such a Rent cannot go to the Successor of a Bishop, for the Successor of a Sole Corporation cannot sue upon a Personal Contract to his Predecessor.

If the Reversion be granted over, the Grantee cannot bring Debt, 2 Rolls 447. 451. 1 Inst. 47. 2. By the same Reason the Assignee of the Lease is not liable.

Again,

Again, The Acceptance is not well pleaded, for it is only Acceptaverunt. Whereas a Corporation aggregate cannot accept but by Bayliff, and an Acquittance must be given.

Saunders contra. This is not a meer Sum in gross, but in the nature of a Rent, as is held in Valentine and Dentons Case, 2 Cro. 111. If it were a sum in gross, no Action could be brought until all the days of payment were incurred, 1 Inst. as upon a Bond to pay Money at several days.

Also the pleading of Acceptaverunt is good, for it being such a Corporation as can accept, necessary circumstances are ever implied, as Livery in a Feoffment; such a Corporation in an Assumpsit shall declare of a Promise made to them, which yet must be by means of their Bayliff or Attorney.

The Court held this last Matter to be most doubtful. And Twylden and Rainsford said it might be questioned, whether after acceptance of the Assignee, the Lessor might not resort to his Lessee for his Rent. It is delivered in Walkers Case thus, *suit dicitur*, not as a Resolution, 3 Co. Et Adjournatur.

Catterel versus Marshal.

Error to Reverse a Judgment in an Assumpsit, brought by Marshal in the Common-Pleas; wherein he declared, that he being sued in the Kings Bench, retained Catterel for his Attorney; who in Consideration of 30s. given him, and that he would enter into a Bond with sufficient Penalty to save him harmless, promised to get Bail filed for him; and Avers, that he did give him Bond with a great and sufficient Penalty, &c. The Defendant Pleads Non Assumpsit, and found for the Plaintiff, and he had his Judgment.

Now it was assigned for Error, that he did not express of what Penalty the Bond was, that it might appear to the Court to be sufficient; as if one avow for a distress upon a Copyholder for a reasonable Fine, the value of the Land must be set forth, and the certainty of the Fine, that the Court may judge of it. Austin and Gervases Case, Hob. 69, 77. In Consideration that he should give him Bond for 10 l. the Defendant promised, &c. and pleads, that he offered him Bond for the said sum, &c. and upon Issue Non Assumpsit, it was found for the Plaintiff. But he could not have Judgment, because the sum wherein he offered to become bound was not express, so that it might appear to the Court to be sufficient.

Jones contra. This differs from the Case in Hob. for there the sum being certain for which the Bond was to be given, the Court may well judge what Penalty will secure it. But it is not so in this Case, for it doth not appear to what value the damni-

cation may be ; so there is nothing, as in the other Case, where, unto to Proportion the Penalty of the Bond.

The Court held, that it would not have been good upon a Demurrer ; but being after a Verdict, and the Statute of Jeofails made at Oxford, (which Twisden stiled an omnipotent Act,) they gave Judgment for the Plaintiff.

Lord Birons Case.

The Lord Biron was Plaintiff in an Action, and upon a Non-Suit five pounds Costs were taxed against him ; and he brought another Action for the same matter, which was said to be merely for vexation ; and that he refused to pay the Costs ; neither could he be compelled being a Peer, and in Parliament time.

Wherefore the Court gave Day to shew Cause, why this Action should not stay until he had paid the Costs in the former.

Anonymus.

If a Writ of Error be brought in the Exchequer Chamber, and that being discontinued, another is brought in Parliament ; this second Writ is a Superfedeas. But if a Writ of Error be brought in Parliament, and that abates, and the Plaintiff brings a second ; this is no Superfedeas, because it is in the same Court.

Prior *versus* Shears.

In a Writ of Error to Reverse a Judgment given in the Palace Court in an Assumpsit, where the Plaintiff declared sur indebitatus pro Naulo, and upon Non Assumpsit, &c. had Judgment.

It was assigned for Error, That it was not ascertained how the Defendant was indebted ; and that Freight was usually contracted for by Charter party, and if so, the general Indebitatus would not lie for a Debt by Specialty.

Notwithstanding the Judgment was affirmed ; for, for ought appears there was not any Deed in the Case ; and it shall not be intended ; and it is no more than the Common Action, pro mercimoniis habitis & venditis.

Note, It was further objected, That this appears to be for Marriners Wages for Sailing to some Foreign parts, which must needs be out of the Jurisdiction of the Marshalsea, and though the Agreement were made within it, yet the thing being to be done elsewhere, they could not hold Plea : As if a Carrier should agree within the Limits of the Court, to carry Goods from thence to York ; no Action could be brought there upon it ; which was agreed.

But

But the Court said here, It doth not appear they were to sail to any place out of the Jurisdiction, and they have laid all the Matter to be *infra Jurisdictionem Curie*. And therefore the Judgment was Affirmed.

Hayman versus Trewant.

TRin. 22 Car. 2. Rot. 710. In an Action upon the Case, for that the Defendant bargained with him such a day and year for the Corn growing upon such Ground, affirming it to be his own, whereas he knew it to be the Corn of J. S. and *postea* adtunc & *ibid.* *fraudulenter vendidit & Warrant*, &c.

The Defendant pleads, That the Plaintiff had another such Action depending for the same Cause, and demands Judgment of the Writ.

The Plaintiff Replies, that that Action was commenced for another Cause, and not for the same; *absque hoc*, that it was for the same Cause. To which the Defendant Demurs specially; because the Plaintiff having denied what the Defendant affirmed, ought not to have added a Traverse, but to have concluded to the Country: As the Case of Harris and Phillips, 3 Cro. 755. was Adjudged, Where in an *Audita Querela*, to avoid the Execution of a Recognizance the Plaintiff sets forth, that it was defeazanced upon payment of others Sums of Money at certain days; and that he was at the place appointed, and tendered the Money, and that the Defendant was not there to receive it. The Defendant pleaded *Protestando*, that the Plaintiff was not there to pay it, and that he was there ready to receive it; *absque hoc*, that the Plaintiff was ready to pay it.

Which being specially Demurred to, the Court held the Plea naught, and that there being an express Affirmative and Negative, there should have been no Traverse; for so they may traverse one upon another in infinitum.

Notwithstanding the Traverse was here held good, which was allowed for putting the Matter more singly in Issue: And it appears that Phillips's Case was Adjudged upon another matter; For that the Plea in Bar was not entered as the Defendant's Plea, but was entered thus: *Pro placito Bosh, a Stranger, dicit, Yelv. 38.*

Then it was moved, That (as the Plaintiff hath declared) here it appears, that the Warranty was subsequent to the Bargain: For it is said, that he bargained for the Corn, knowing it to be the Corn of J. S. *postea* adtunc & *ibidem* vendidit, which is repugnant. Sed non allocatur; for where it is said first, That he bargained, that shall be intended a Communication only, and the Consummation of it after, when the Warranty was given, which is also said to be adtunc & *ibidem*. So alleged well enough.

Foxwith

Foxwith *versus* Tremaine.

TRin. 21 Car. 2. Rot. 1512. Five Executors bring an Action *sur Indebitat' Assumpi.* The Defendant pleads in Abatement, That two of them are under the Age of 17. and that they appeared by Attorney. And to this the Plaintiffs Demur.

They who Argued for the Defendant made two Questions:

1. Whether they ought all to joyn in the Action? And it was said, they ought not; for one under Age cannot prove the Will. And in Smyth and Smyth's Case; Yelv. 130. it is Resolved, they must be all named, so that their Interest may be reserved unto them; but are not to be made parties to the Action. And for this the Case between Hatton and Mascue, which was Adjudged in the Exchequer Chamber, was cited: Where in a Scire facias it was set forth, That A. being the Executor of B. made his Will thus:

I Devise all my Personal Estate to my two Daughters and my Wife, whom I make my Executrix: And that they had Declared in the Ecclesiastical Court, that this made them all three his Executrices, and that the Will was proved; and that the Wife brought this Scire facias, to have Execution of a Judgment obtained by A. the Testator. And the Defendant Demurred, because not brought in all their Names; and it was Resolved in the Kings-Bench that the Action was well brought, and affirmed upon a Writ of Error in the Exchequer Chamber: But if in the Case at Bar they ought to joyn, they must appear by Guardian.

It having depended divers Terms, It was now Resolved by Rainsford and Moreton, that the Action was well brought; and they relied upon the Case in Yelverton; and they said, the Case of Hatton and Mascue was no Authority against it, for there they were named; and where some are of Age, no Administration *durante minori etate* is to be granted.

They held also, that the appearance ought to be by Attorney, because they joyn with others; and so in *auter droit*; and so is 3 Cro. 377. the Countess of Rutland's Case, and 541. Resolved, that an Infant Administrator shall sue by Attorney. See 1 Roll. 288: and 2 Cro. 420, & 421. Cotton and Westcote's Case. The difference is taken where an Infant Executor is Defendant, and where Plaintiff, and Judgment given for him; in which last Case only the appearance by Attorney is said to be good.

Twisden contra. An Infant cannot in any wise sue or defend by Attorney.

First, Because he cannot make an Attorney.

Secondly, If it should be allowed, he might be amerced *pro falso clamore*, and no way to avoid it but by bringing a Writ of Error.

Thirdly,

Thirdly, He might be injured by the Attorney's Plea, and could not remedy himself, as he may against his Guardian; as if in Debt the Defendant should plead a Release, and the Attorney confess it. And he cited a Case in this Court, Mich. 1649. between Colt and Sherwood, Where an Administrator brought an Action, and it appeared by the Record, that he was above 17; yet it was Ruled, he ought to sue by Guardian. For tho' by the Civil Law he was of Age to undertake the Administration; yet the manner of his Suing was to be determined by our Law, and that could not be by Attorney until the age of 21.

Another Case he cited between Peyton and Dorce, adjudged in this Court upon a Writ of Error, out of the Petit Bag; where Peyton sued as Administrator, and the Entry was Quod queritur, and did not express, whether per Attornat', Guardianum, or how; and had Judgment; and Error was brought in this Court, and these four Points were Resolved:

First, That a Writ of Error did lye out of the Petit Bag into this Court, upon an Error in Fact.

Secondly, That the Entry being General, it should be taken that the appearance was in propria persona.

Thirdly, That the Plaintiff being an Infant, tho' an Administrator, could not sue or appear, but by Guardian or Prochein amy.

Fourthly, That the Statute of Jeofails did not aid this Case, which expresses only the Defendant's appearing by Attorney.

As to the other Point, He inclined that the Action brought by them all was well enough: But he acknowledged that much might be urged against the Case of Hatton and Mascue; for the naming of them could signifie nothing, not being made parties to the Action. But he was not so much swayed by that Authority, because he held, that the Cause did not come well into the Exchequer Chamber, being a Scire facias, upon which he said no Writ of Error lay thither, tho' upon a Judgment, no more than upon a Recognizance, and said, They did joyn here, as it were, for Conformity. As if a Feme Infant be made Executrix, and Parties, the Administration durante minori etate ceases, tho' she be under 17, and she and her Husband shall Sue.

The Chief Justice was absent, being Sick; and so the Plaintiff had Judgment by the Opinion of Rainsford and Moreton.

Ward *versus* Rich.

Ward brought an Action against Hatton Rich de uxore abducta, and keeping of her from him, usque such a Day, which was sometime after the exhibiting of the Bill, and concluded contra formam Statuti.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment

ment, and the Declaration was held good notwithstanding the impertinent Conclusion of contra formam Statuti, there being no Statute in the Case.

Secondly, The Court Resolved, that Judgment should be stayed; for the Jury shall be intended to give Damages for the whole time mentioned in the Declaration: As in Trespass, with a Continuando, to a day after the Writ brought, the Plaintiff shall not have Judgment after Verdict, which gives Damages by Intendment for the whole time declared for.

And Twisden said, These two Cases were Resolved: A Tradesman brought an Action in an Inferiour Court, for slandering of him in his Trade, by which he lost his Custom within the Jurisdiction of that Court, & alibi; and it was held maintainable notwithstanding the alibi.

The other was an Action brought upon the Sale of several things for divers Sums of Money, quæ quidem pecuniarum summae attingunt ad 10 l. whereas rightly computed they came but to 9 l. The Jury gave Damages less than 9 l. and it was held good: But if the Verdict had been for 10 l. it had been naught.

The King *versus* Ledgingham.

An Information was brought against Ledgingham, for that he being a man of an unquiet Spirit, communis perturbator & oppressor vicinorum & tenentium, had taken excessive Distresses of divers of his Tenants.

After Verdict for the King at the Assizes, it was said, That no Judgment could be given upon this Information, which was said to be defective both in matter and form.

It hath been often Ruled, that Communis oppressor, or such like General words, without particularizing Offences, was insufficient in an Indictment or Information, unless the word Communis Barrektor, which is of known signification in Law, and comprehends divers Crimes; and Twisden said, is as much as Common Knave, 9 Ass. 2. Communis latro, not good: Vid. Roll. 79. Moor 451. neither can an Information be exhibited for taking of excessive Distresses; for that was not punishable until the Statute of Marlebridge, cap. 4. which saith, that he that so Distrains shall be amerced, whereas upon an Information he must of necessity be fined, 2 Inst 107.

Again, It ought to have been expressed upon what Tenants the Distresses were taken, with their Names, otherwise it is too incertain. One was Indicted, for that he serving upon such a Grand Enquest, did reveal the Secrets of the King and himself. It was Resolved to be ill, because not expressed what Secrets, Moor 451. and of this Opinion was the Court in omnibus. Ante.

Pierlon

Pierſon verſus Ridge.

IN Replevin, the Defendant made Conuſans as Bayliſſ to a Lord of a Mannor, who had a Court Leet by Preſcription, and laid a Cuſtom for ſuch a Townſhip to ſend one to be ſwoyn Conſtable there, which not being done, a Fine was ſet, and this Diſtreſs taken for it. Upon which it was Demurred; becauſe no Cuſtom was alledged to warrant the Diſtreſs: For tho' of common Right a Diſtreſs may be taken for a Fine in a Court Leet, that is, where it is impoſed for ſuch things as are of common Right incident to its Jurisdiction, as for Contempts, or the like: Yet where Cuſtom only enables them to ſet a Fine, it cannot be Diſtrained for without Cuſtom alſo, 11 Co. Godfrey's Caſe: And to this Opinion did the Court incline. Sed Adjournalur.

Anonymus.

TWO Actions of Account were removed into this Court by Habeas Corpus, and Special Bail put in. And it was moved, that the Bail might be diſcharged, and Common Bail filed; becauſe in an Account Special Bail is not to be put in. But it was ſaid, the Plaintiff had declared in one in an Action upon the Caſe, and ſo prayed that the Bail might ſtand quoad that.

But it was Ruled, That the Bail ſhould be diſcharged; and if the Plaintiff would have Special Bail, he muſt Arreſt the Defendant again in an Action upon the Caſe.

Doctor Lee's Caſe.

DOCTOR Lee having Lands within the Level, was made an Expenditor by the Commiſſioners of Sewers; whereupon he prayed his Writ of Privilege in this Court; and it was granted. For the Reſiſter is, Vir militans Deo non implicetur ſecularibus negotiis; and the ancient Law is, Quod Clerici non ponantur in Officia; F.N.B. Clergy-men are not to ſerve in the Wars.

Jemey verſus Norris.

ERROR to Reverse a Judgment in an Aſſumpſit, upon a Quantum meruit for divers things ſold.

It was aſſigned for Error, that the Declaration amongſt the reſt was for unum par Chirothecarum, and did not expreſs what ſort of Gloves they were, which are of much different prices, according to the different Leather they are made of. And Playter's Caſe, 5 Co. was cited, where Treſpaſs for taking of his Fiſhes, was held not

not good, because not ascertained of what kind: Sed non allocatur.

Another of the things declared for was una parcella feli, which (as it was said) was utterly uncertain; and that was held to be naught. Tho' it was said, an Action was brought for taking away unum cumulum Fœni, Anglicè, a Rick of Hay, and not alledged how much it contained; yet held good. But in Webb and Washburn's Case an Action was brought for a pair of Hangings, and it was Adjudged against the Plaintiff, for the Incertainty.

Jones contra, and cited a Case in this Court 24 Car. 1. Green and Green, in Trover for six parcels of Lead, and notwithstanding the Incertainty the Plaintiff had Judgment. So in Trover for a Trunk de diversis Vestimentis, and did not say what Garments; and yet held good. But admitting it should not be good in Trover; yet it is well in this Action. 'Tis the Common course to declare sur Indebitatus pro mercimoniis, and never express what they are.

And the Court were of Opinion, that the Plaintiff was to have Judgment; for it is an Action much of the same nature with an Indebitatus.

And Twisden said, Where the Promise is to pay Quantum meruit, he knew not why the Plaintiff might not declare upon an Indebitatus in a certain Sum, and that he might prove the value upon the Evidence; and if such a Case came to be tried before him, he would have a Special Verdict found in it.

The Court said, Such an uncertain Declaration would hardly be good in Trover or Replevin, and held the Case of the six Parcels to be strange; and for the Trunk, that an Action lies; for that the things contained in it were alledged but as matter of aggravation of Damages.

Vid. the Case of Taylour and Wells, ante: Trover de decem paribus velorum & tegularum, Anglicè, Ten pair of Curtains and Vallance.

Willon versus Armorer.

In Debt against the Heir, and Riens per discent pleaded, the Case upon Special Verdict was thus: The Ancestor made a Feoffment of a Mannor to divers ules, excepting two Closes for the Life of the Feoffor only; and whether those two Closes did discent, was the Point referred to the Judgment of the Court.

And it was Adjudged, That they did discent, either for that the Exception was good; tho' the latter part of the Sentence, (viz.) for the Life of the Feoffor only, was void, and therefore to be rejected; or, if the whole Exception were void, because one Intire Sentence.

Pet

Yet they all agreed, that there was no Case limited of those two Closes which were intended to be excepted; for the Case was limited of the Mannor exceptis præexceptis, which excluded the two Acres. For altho' there were not sufficient words to except them, yet there was enough to declare the intention of the Feoffor to be so.

Anonymus.

And Indictment for Erecting of a Cottage for Habitation; contra Statut' 31 Eliz. cap. 7. was quashed, because it was not said that any had inhabited in it; for 'tis no Offence before, per Rainsford & Moreton, ceteris absentibus.

Termino Sancti Hillarij, Anno 22 & 23 Car. II. In Banco Regis.

Robson's Case.

A Prohibition was prayed to a Suit for Tythes by the Parson, upon a Suggestion of a Modus paid to the Vicar, and that the Vicaridge had time out of mind been Endowed.

Coleman moved for a Consultation, because the Endowment of the Vicaridge was not proved by two Witnesses within six Months, according to the Statute.

But it was denied; for that part of the Suggestion is not to be proved by Witnesses, but only the payment of the Modus. And it was said, If the Suggestion consisted of two parts, it was sufficient to produce one Witness to the one, and another to the other.

Dacon's Case.

Dacon was presented in the Court Leet, for refusing the Office of Constable, and fined.

It was moved to quash it, because it expressed the Court to be held *infra unum mensem Sancti Michael* (viz.) 12 November, and so the Day shewn above a Month after Michaelmas. And it is necessary to set down the precise Day, for it may else be upon a Sunday, and yet within a Month after Michaelmas; and for this cause the Court held, that it must be quashed.

Error.

A ⁿ Outlawry was Reversed, for that the Proclamations were Returned to be ad comitat' meum tenet' apud such a place in Com' prædict', and not said, pro Comitatu: for anciently one Sheriff had two or three Counties, and might hold the Court in one County for another.

Calthorpe *versus*

In Debt for Rent the Plaintiff declared, that he let the Defendant such Land, anno 16 of the King quamdiu ambabus partibus placeret; and that anno 16 the Defendant entered, and occupied it pro uno anno tunc proxime sequent'; and because the Rent was behind pro prædict' anno finit' 18 he brought the Action. Upon which it was Demurred.

Because the Rent is demanded for the Year ending 18, and it is not shewn that the Defendant enjoyed the Land longer than anno 17. And in Debt for Rent upon a Lease at Will, Occupation of the Tenant must be averred.

To which it was Answered,

That it is said, Pro prædicto anno, which refers to the Year mentioned before, which was next following the Lease, and it might be said finit' anno 18, for so it was ended then, or at any time after.

And the Court said, It would be clearly good after a Verdict: But being upon a Demurrer they would Advise.

Anonymus.

A ⁿ Indictment for not performing an Order of the Justices of the Peace, concerning a Bastard Child.

It was moved to quash it, because it did not conclude contra pacem. But it was held, that ought not to be, it being but for a Non feassans.

An Indictment of Forcible Entry was quashed, because it alleged the party to be seized and possessed, and so uncertain which.

Moannington *versus* William.

In a Replevin the Defendant avowed for a Rent charge, and set forth, That the Plaintiff granted a Rent to J. S. in Fee, who granted, bargained and sold it una cum arreagiis to him, and shewed the Indenture to be enrolled within six Months, virtute cujus,
and

and the Statute of Uses, he was seized, and for a years Rent since the Assignment abowed.

The Plaintiff replies, and Traverses the Grant of J.S. prout, and found for the Avowant, and moved in Arrest of Judgment by Jones,

First, That here is an impossible Issue, which comprehends as well the Grant of the Arrears (which cannot be) as the Rent.

Secondly, He Justifies himself by Bargain and Sale, and the Statute of Uses, and doth not shew that it was in Consideration of Money; and otherwise the Rent cannot pass without Attornment, 3 Cro. 166.

But the Court gave Judgment for the Avowant.

As to the first, The pleading the Arrears to be granted is altogether void, and does no harm, in regard the Avowry is expressly for Rent Arrear after the Grant.

And for the second, The Court held the pleading good after a Verdict; and it shall be intended, that Evidence was given of Money paid. As a Grant of a Reversion pleaded, without Attornment; or a grant of a Rent, and not expressed to be by Deed; yet a Verdict will help those defects, Hurtons Rep. 54.

Note, Twissden said, where a man in pleading sets forth his Title by a Conveyance, in which are the words Give, Grant, Release, Confirm, Bargain, Sell, &c. he must express to which of them he will use it.

Addams versus Guy.

ERror to Reverse a Judgment given in the Court at Bristol, in Debt against the Defendant as Executor to J.S. who declared upon a Mutuasset of him so much, because Debt lies not against an Executor upon a simple Contract.

Sed non allocatur, He agreeing to the Action, and suffering Judgment to pass against him.

Secondly, That he set forth, that the Testator Mutuasset, which properly signifies to lend and not to borrow, and it ought to have been Mutuarius esset.

But the Court affirmed the Judgment; and held, that either might be expounded to borrow.

Anonymus.

AN Administrator brought Trover and Conversion, and declared, That the Intestate at the time of his Death was possessed of divers Goods, and that after his Death, and before Administration committed, they came to the Defendants hands, who converted them.

Upon

Upon Not guilty it was found for the Defendant, and prayed that he might have Costs; and the Court held that he ought to have them, the Conversion being since the Death of the Intestate.

Sir Thomas Pettus Case.

It was moved to quash an Indictment of Manslaughter against him, for that it is said to be taken coram Coronatoribus Comitatus & Civitatis Norwici, at Buckthorp in the County of the City, per Juramentum hominum de Civitate Norwici.

Whereas the Jury ought to have come from the County and City of Norwich, for they shall not be intended to be coexistent, especially in an Indictment.

As if the Caption of an Indictment be at Dale, and the Jury come de Parochia de Dale, it is good cause to quash it; yet in an Action they should be intended the same: So it is sufficient to put the County in the Margin of the Declaration in an Action, but not so in an Indictment, 1 Cro.

Again, By the Statute de Coronatoribus, the Jury ought to come from the four next Vills.

Of the first Exception the Court doubted.

But to the second Twisden said, it need not be returned upon the Indictment, that the Jury came from the four next Vills.

But they would not quash the Indictment upon Motion, for they said it was not their course to do so in Case of Manslaughter; but ruled the Party to Plead to it, tho' it was shewn he had been Tried at the Assizes upon an Indictment of Murder, for the same Killing, and found Guilty of Manslaughter.

The King *versus* Clapham.

A Mandamus was prayed to the Lord President, and Council of the Marches to admit Clapham to the Exercise of the Office of Deputy Secretary.

And it was returned quod tempore receptionis brevis non fuit constitutus Deputatus.

It was said, That one which claimed to be Deputy, his Authority being revocable, could not pray a Mandamus.

But to that it was answered, That the Mandamus was at the Suit of Mr. Win; and it set forth how he had the Office of Secretary, exercend' per se vel sufficientem Deputatum suum; and that they had refused this Clapham, whom he had appointed his Deputy.

And

And it was resolved, That the Mandamus was well awarded, so; he had no other remedy to have his Deputy admitted. And whereas it was said, being an Officer belonging to the Court, they are to judge of his sufficiency, and so have power to refuse him.

It was answered to, and so resolved, That then they ought to have returned, that he was insufficient.

And it was also resolved by all the Court, That the Return being, that non fuit tempore receptionis brevis Deputatus constitutus, was naught; so; if he were made his Deputy before, the Return was true, unless he made him his Deputy at the very instant of the Receipt of the Writ; and Returns must be certain, because there is nothing can be pleaded to them.

Anonymus.

And Indictment so; not performing an Order of the Justices, so; payment of a Poors Rate.

It was moved to quash it, because it did not conclude, Contra pacem: Sed non allocatur, because it was not so; a Male Fefans, but a Non Fefans.

Horlam *versus* Turget.

Mich. 22 Car. 2. Rot. 687. Debt upon a Bond.

The Defendant demands Oyer of the Condition, which was to perform an Award; and sets forth, that there were divers Accounts, &c. between J. S. Testator of the Plaintiff, and the Defendant; and they submitted all Controversies to the Award of such an one, and that he awarded, that the Plaintiff should deliver certain Goods, of which the Testator died possessed, to the Defendant; and that the Defendant should pay unto the Plaintiff 320 l. And then sets forth the custom of Foreign Attachments in London; that if a Suit were commenced against the Executor of any person, any Debt which was due to the Testator tempore mortis suae might be attached; and then sets forth according to the common form, how this 320 l. was attached, &c. and Avers, that there were no other Controversies, Differences or Matters between the Plaintiff and Defendant, but what concerned the Testator of the Plaintiff and him as his Executor only.

The Plaintiff replies, That the Defendant had not paid the 320 l. according to the Award, &c. upon which the Defendant Demurred.

And whether this Money were Attachable as a Debt due to the Testator, tempore mortis suae was the Question.

It

It was argued by Winnington, That it was. For it appears by the Averment, that it was awarded to be paid merely upon the Testators account, and it is but as it were a reducing the Testators Debt to a certainty; for an Award being no Record of Specialty will not alter the nature of the Debt; and that clearly it should be Assets in the Executors Hands; and the Custom of London was to have a liberal Construction.

Pemberton contra. It doth not appear, That there was any Debt due to the Testator: There might be Covenants, or other Matter between them, which shall be rather intended than Debt, as strongest against the Plaintiff; if there were, the nature of the Debt is altered, for an Award may be pleaded in Bar to an Action brought upon the Original Debt.

Also this must have been sued for in the Debt and Detinet, and not in the Detinet only; so it is not a reducing the Debt to a certainty; as where an account is made upon Debts by simple contracts, or where an Executor gives time for payment of a Bond due to the Testator, this is still Attachable, 1 Rolls

551.
He denied it to be Assets. If it were, the Administrator de bonis non might sue for it after the Executors death, which clearly he could not do; and the Executor was chargeable only in proportion to the Debt extinguished, and not according to the Sum Awarded, or at least it could not be Assets before recovered; if it were Assets it did not follow it should be Attachable, for if an Executor Recovers in Trespass, for taking away the Testators Goods, the Damages shall be Assets; yet they are not Attachable: So Damages recovered upon Covenant made to the Testator.

He said it would be very inconvenient that this Money should be attached, for the Executor was liable to a Devastavit upon this matter, and yet should have no remedy for the Sum Awarded.

Again, It would be Attachable in two respects, both as the Executors Debt, (for so clearly it is) and as the Testators Debt, and the Bond for performance would be Attachable for the Executors Debt, and the Sum Awarded for the Testators. He said all Customs ought to be taken strictly, and this was clearly out of the words, as being no Debt due to the Testator tempore mortis sue. And here it is pleaded, That it was Commanded by the Court to the Officer to Attach the Defendant by a Debt due to the Testator at the time of his Death, so no Authority to Attach this Debt; and if it were by Law Attachable, the Command ought to have been Special.

The Court were all of Opinion, That this was not Attachable as the Testator's Debt; for then the Administrator de bonis non might sue for it. And they held it to be like the Cases where the Executor takes Bond for a Debt due to his Testator, or where he sells the Goods, the Money for which they are sold cannot be Attached; and here the Award is made of this Sum, in Consideration of conveying to the Defendant the Goods of the Testator, and releasing of his Debts, which seems to be all one with the other Cases.

And so they gave Judgment for the Plaintiff.

Termino Pasche, Anno 23 Car. II.

In Banco Regis.

Error.

A Judgment out of an inferior Court was reversed, because being by default the enquiry of Damages was only by two Jurors, and Custom alleged to warrant it.

And it was resolved by the Court, That there cannot be less than twelve, though the Writ of Enquiry saith only per Sacramentum proborum & legalium hominum, and not duodecim as in a Venire.

Note, There were divers Recognizances taken before the Lord Chief Justice Keeling; who died before his Hand was set to them.

It was moved by Coleman, that they might be filed.

But the Court said a Certiorari must go to his Executors to certify them, and doubted whether they were compleat Records.

If a Warrant of Attorney be given after the continuance day, to enter up a Judgment as of the Term preceding; this may be well enough, if it be dated within the Term; but it cannot be so, if such a Warrant be given to confess a Judgment generally, and dated after the Term.

Anonymus.

Anonymus.

A Prohibition was prayed by one, who being a Churchwarden, was tendered an Oath by the Court Christian, to present according to the Bishops Articles, which he refusing to take, was Excommunicated.

Now, for that some of the Articles were to present Filthy Talkers, Revilers and Common Sowers of Sedition amongst Neighbours, which were general Terms, and might be understood to comprehend things out of their Jurisdiction, the Court conceived a Prohibition ought to go as to them.

But he should have first pleaded there, *quod non tegeretur respondere* as to those matters, and upon their refusal to have prayed a Prohibition.

Elpicke versus Acton.

A Action of Trover was brought *de diversis vestimentis*. And held not to be good, because not expressed what kind of Garments.

But *Jac. Emery's Case*, where Trover was brought for a Library of Books, and held to be good without expressing what they were; because to set down the particular Books, would make the Record too prolix. *Vid. 3 Cro. 164. and Pl. Com.* where a man pleaded that he was chosen Knight of the Shire, *per majorem numerum*, and held to be good.

Barnard versus Michel.

In an Action of Debt, the Plaintiff declared upon a Deed comprehending divers Covenants, for the performance of which the Defendant obliged himself in the penalty of 40 l. and sets forth that the Defendant had broke the Covenants.

The Defendant pleaded *non est factum*, and it was found for the Plaintiff.

And it was moved in Arrest of Judgment, That though the Issue was found for the Plaintiff; yet he having assigned no Breach, no Cause of Action appeared upon the Record: so he could have no Judgment.

For if the Declaration be insufficient, let the Defendant plead what he will, yet Judgment shall not be given against him.

Indeed if the Action had been brought upon a Bond Conditioned for the performance of Covenants, and *non est factum* had been pleaded; no Breach needed to have been assigned, for then the Declaration is only upon the Bond, without mentioning any thing of the Condition.

But

But here the Breach of the Covenant is, as it were a Condition precedent, to Entitle him to the Penalty; and here the declaring that he broke the Covenants without shewing which, or how, is altogether insufficient, though the Defendant who pleads in the Negative, might have pleaded non infregit conventiones. Vid. Rastals Entries 162. Pl. Com. 5. A President just agreeing to this Case.

But the Opinion of the Court inclined for the Plaintiff here. Sed Adjournatur. Vide Postea.

Anonymus.

A Mandamus was prayed to the Ecclesiastical Court, to Swear two Churchwardens elected by the Parish, surmising that so was the Custom in that place; but that the Bishops Officers had refused to admit them, upon pretence that the Parson ought to chuse one.

And it was granted. Vid. 2 Rolls 106, 107. 3 Cro. 551, 589. such a Writ granted.

The Case of the City of London and Coates.

Coates who was Imprisoned in Newgate, by the Court of the Lord Mayor and Aldermen, brought an Habeas Corpus, and the Sheriffs returned, that the Custom of the City was, That if any Freeman hath foxestalled any Fish, coming to any Market within the City, and complaint made thereof to the Court of Aldermen, and he appearing there confessing the same, and they ordain that he shall desist from such foxestalling, and he will not promise to obey; but declares in Court, That he will not obey their Order, That the Court there had time out of mind used to Commit such Freeman, until he signified to the said Court, that he would conform himself.

Then it is Returned, That complaint was made to the said Court, that this Coates had foxestalled a great number of Lobsters; whereupon they caused him to appear, which he did, and confessed the same, and they ordained, that he should desist from such foxestalling; but he said Obstinately and in Contempt of the Court, That he would not obey their Order; whereupon they committed him to Newgate, until he should signify to the Court, that he would conform himself, or otherwise be delivered by due course of Law.

The Return being Filed.

It was moved by the Attorney General, That it was insufficient; for a Custom to commit a man for foxestalling is void, and that Offence was always Bailable, and so it appears by the

Register; But here the Commitment is to remain in Prison, without Bail or Mainprise.

Also the Commitment is upon a Complaint without Oath, which ought not to be; neither ought they to extort a Promise from him, to observe their Order, admitting it to be Legal, for an Oath cannot be imposed upon a Man to keep the Law.

Besides, The Custom is absurd, to Commit a Man to Prison until he submits to the Court; whereas a Man in Prison cannot come into Court to make such Submission; and then suppose they will keep no Court, must a Man lie in Prison whilst they do?

Then the Custom as it is laid, reserves the discharge of him only to themselves; for it is said, or by due course of Law.

This Imprisonment looks in the Face of Magna Charta, which saith nullus liber homo Imprisonetur, &c. in all Offences Finable, the Imprisonment is only to be until the Fine is paid; if the Fine be tendered, there is to be no Imprisonment at all, and so resolved in Parliament, Br. tit. Imprisonment 100.

To this it was answered by Jones on the other side, That the Imprisonment in this case was not for forestalling, but for the Contempt to the Court.

It is returned that he confessed the Fact, and yet declared that he would not conform himself to the Order of the Court; the Proceeding is very mild, not to punish for an Offence unless committed after an Admonition in Court. It is implied in the Custom, That he may be delivered by due course of Law, it is sufficient to express that in the Commitment, and so it is.

Also he cannot be prejudiced by the deserting of Courts, for the Custom is returned to keep the Court of Aldermen twice a Week.

It is not that he shall come in person and submit to the Court; but that he shall signify his conformity to the Court, which may be done by Letter or Message; and it is returned, that he did not by any means submit himself.

Twisden, The Custom doth not here come in Question, The Commitment is returned to be for a Contempt to the Court; It must be allowed they have such power, for they are a Court of Record. Langham was Committed, for refusing to take the Oath usually administered to Sheriffs; and resolved to be good, because it concerned the Government. The City hath the Regulation of Trade, and Orders made by them, that one Man should not use the sign of another, and for distinguishing Trades, (Viz.) That a Plasterer should not use the Trade of a Bricklayer, and such like, have been allowed.

Wherefore the Court remanded the Prisoner, he promising to make submission at the next Court, and the Sheriff promising he should be discharged thereupon.

Phillips

Phillips *versus* Kingston.

Hill. 22 & 23 Car. 2. In an Action of Slander the words were, He hath broke three or four of his Fathers Ribbs, of which he shortly after died, and I will complain to a Justice of him: He may be hang'd for the Murder altho' it were done twenty years since.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that he did this hurt to his Father against his will, as it might be intended; and tho' the Defendant said he might be hanged for it, that is but his Judgment and Collection thereupon. As Jacob and Mills's Case, 2 Cro. 343. where the words were, Thou hast poisoned Smith, and it shall cost me an hundred pounds but I will have you hanged for it. And it was Resolved that an Action did not lye, because it might be unwillingly done, Hob. 6.

Also it is not averred that the Father was dead, and that is necessary; for otherwise it shall be taken that he is alive, and then 'tis no Slander; and so is Yelverton 21 and Hob. 6.

But the Court held, That the Plaintiff must have his Judgment; for taking all the words together, the Defendant must necessarily intend a murderous Killing; and for the not averring that he was dead, Twisden said, the latter Opinions have all been, that this is not necessary; and the Action lies, unless it appears upon the Record that the party is alive.

Anonymus.

In an Action for Words, the Plaintiff declared that he was a Woollen Draper; and the Defendant said of him, You are a cheating Fellow, and keep a false Book.

After Verdict for the Plaintiff it was moved in Arrest of Judgment, that the words might not be intended to relate to his Trade; for they were capable of another sense, and there was no colloquium of his Trade.

Sed non allocatur: for they must be intended of a Debt-Book which Shop-keepers keep, and to say such an one keeps a False Book it is a great slander to him in his Trade. Vid. 1 Cro. 403.

Twisden cited a Case, Where Roberts an Attorney brought an Action for saying, Go tell the black Knave Roberts, That I will teach him, or any Attorney in England, to sue out a Writ against me, and he had Judgment; for it was as much as to call him Knave Attorney, Hill. 22 & 23 Car. 2. Rot. 1426.

Methin

Methin and the Hundred of Thistleworth.

AN Action was brought upon the Statute of Winton. The Defendants pleaded, that they made Hue and Cry, and that within 40 Days they took one Dudley, which was one of them that did the Robbery, and had him in custody.

The Plaintiff Replied, That Dudley was not taken upon their fresh pursuit modo & forma.

And upon this Issue the Jury find a Special Verdict to this effect:

That the Hundred made Hue and Cry, and that Sir Joseph Ash finding Dudley in the presence of Sir Philip Howard, a Justice of the Peace of Westminster, at his House in Westminster, the said Sir Joseph being an Inhabitant in the Hundred of Thistleworth, charged Dudley with this Robbery before Sir Philip, who promised he should appear at the Sessions at the Old Baily.

And whether this be such a Taking as is put in Issue, they referred to the Judgment of the Court.

Jones for the Plaintiff Argued, That in this Case there doth not appear to be any Taking at all, but only a Discourse between Sir Joseph Ash and Sir Philip Howard. As admitting the Issue were, Whether a man were Arrested or no; and it should appear upon Evidence that one should come to the Sheriff and declare, That he had a Writ against such a man then present; and upon this the Sheriff should say, I will take his word for his Appearance; this clearly could not be taken for an Arrest.

Again, The Issue is, Whether he were taken upon the fresh pursuit of the Hundred; and it doth not appear by the Verdict that there was any Hue and Cry made this way, and it might be ceased before this time: But it seems rather, that Sir Joseph Ash found him by accident.

But the Opinion of Hales Chief Justice, Twissden, Rainsford and Moreton, was, that Judgment ought to be given for the Defendant: For the charging of Dudley with the Robbery in the presence of a Justice of the Peace was clearly a Taking within the Statute.

For being in the presence, which the Law construes to be under the Power or Custody of the Magistrate, it would have been vain and impertinent to have laid hold of him; and it shall be intended, that this was upon Fresh pursuit: For when the Verdict refers one Special Point to the Judgment of the Court, all other matters shall be intended.

And

And the Chief Justice said, That if the Hue and Cry was made towards one part of the County, and an Inhabitant of the Hundred apprehended one of the Robbers within another, yet this was a Taking within the Statute.

Hornsey (Administrator of Jane Lane) *versus* Dimocke.

The Plaintiff, as Administrator of Jane Lane, brought an Assumpsit, and declared, that he had formerly deposited such a Sum in the Defendants hands, for the use of the Intestate Jane Lane; in Consideration whereof the Defendant promised to the Plaintiff, that he would pay it her; or if she died before 18 years of Age, that he would pay it to her Executors: And shews, that she died before 18, and that he had not paid it to the Plaintiff, her Administrator, licet sæpius requisitus.

Upon non Assumpsit, a Verdict was for the Plaintiff.

It was moved in Arrest of Judgment, that the Plaintiff brought this Action as Administrator, which ought to have been in his own right; for the Promise was made to him.

Sed non allocatur: For if a man names himself Executor or Administrator, and it appears the Cause of Action is in his own right, it shall be well enough, and he calling himself Executor, &c. is but Surplusage. But here it seemeth Jane Lane might have brought an Assumpsit, because she was the party to whom the Money was to be paid. So it is good either way.

It was further Objected, That it was not averred, that the Defendant did not pay the Money to Jane Lane during her Life.

Sed non allocatur: For 'tis aided by the Verdict. As the Chief Justice said a Case was Adjudged, where an Assumpsit was brought upon a Promise to pay Money to two or either of them; and declared that the Money was not paid to the two, and not said, or either of them; yet Resolved to be good after Verdict.

Matthewes *versus* Croft.

In Debe for Rent the Plaintiff Declared, That by an Indenture made in the Parish of St. Mary Underhast, London, he Let an House to the Defendant, situate in parvo-Turris monte, reserving so much Rent, &c.

The Defendant pleads, That before the Rent incurred, the Plaintiff entred into a certain Room of the said House, apud parvum-Turris montem prædict, and so suspended his Rent. upon which it was Demurred.

And

And it was shewn for Cause, That no place was alledged where the Entry was, but said to be at Little Tower Hill, which cannot be intended a Vill. And a Case was cited of an Indictment in this Court, of a fact said to be done at White-Hall, and quashed for want of Place. And to this the Court inclined; but the Matter was ended by Comprimise.

Anonymus.

A Prohibition was prayed to a Suit for a Pension in the Ecclesiastical Court, surmising that the Lands out of which it was demanded were Monastery Lands, which came to the King; and that he granted the Lands, &c. under which Grant the Plaintiff claims; and that he Covenanted to discharge the said Lands of all Pensions, &c. and this upon the Statute of 34 H.8. cap. 19. which appoints the Suit to be for Pensions in such cases in the Court of Augmentations, and not elsewhere.

But the Court would not grant it, until the Letters Patents of Discharge were produced, being a matter of Record.

But where the Surmise is of matter of Fact, it is sufficient to suggest it.

And it was said by the Court, That Pensions, whether by Prescription or otherwise, might be sued for in the Ecclesiastical Court; but if by Prescription, then there was also Remedy at the Common Law. F.N.B.50. 1 Cro.675.

Davis *versus* Wright & al.

Hill. 22 & 23 Car. 2. Rot. 701. In an Assumpsit the Plaintiff declared, That his Father gave him by his Will 3 l. per annum during his Life, and that he was about to Sue for it; and that the Defendants being Executors to the Father, in Consideration that the Plaintiff would forbear to commence a Suit against him for it, promised to pay him.

The Defendants plead, That the Testator was indebted in divers Sums, and ultra to pay them he had no Assets.

To this the Plaintiff demurred; for that by this Promise the Defendants have made it their proper Debt.

But it was said on the other side, That if there were no Assets, there was no cause for the Plaintiff to have commenced a Suit: And to stay a causeless Suit can be no Consideration; as the Case of Smith and Johns, 2 Cro. 257. where one having married an Executrix, after her decease promised J. S. that if he would forbear a Suit against him for a Legacy, he would pay it.

1 Cro. 804.
Yelv. 84.
184.

It was held to be a void Promise, being in no wise liable to be sued after the Death of his Wife: And the Opinion of my Lord Coke, 9 Rep. 94. in Bane's Case is, That an Executor shall not be charged with such Promise, unless he hath Assets.

But the Court Resolved for the Plaintiff: For it is not material whether the Defendants had Assets or no at the time of the Promise; for by the Promise they caused the Plaintiff to desist, who peradventure at that time was prepared to prove Assets; and relying upon such Promise might be much to his prejudice, if he could not afterwards recover upon it.

But the Chief Justice said, If it had appeared upon the Declaration that there were no Assets, the Plaintiff by shewing that would have destroyed his Action.

Vere versus Smith.

In Debt upon an Obligation.

The Condition recited, that the Defendant served the Plaintiff as a Brewer's Clerk, and that if he performed such Covenants, &c.

The Defendant pleads, performavit omnia.

The Plaintiff Replies, That one of the Covenants was to give the Plaintiff a true Account of all such Moneys as the Defendant should receive, &c. whensoever he should be thereunto requested; and alledged, that so l. came to his hands, and that he requested him to give an account of it, which he refused to do.

The Defendant Replies, confessing the Receipt of the said Money, but saith, That before Request made by the Plaintiff, he laid it up in the Plaintiffs Warehouse, and that certain Palefactozs (to the Defendant unknown) stole it away, & hoc paratus est verificare. And to this the Plaintiff Demurs generally.

And Jones Argued, That the matter contained in the Rejoinder was a Departure from the Bar, for it doth not amount to an Account; but rather an Excuse or Discharge of himself, why he should not account.

Again, He ought not to have abetted his Plea, but to have concluded to the Country; for the Plaintiff in his Replication having alledged, That he gave no Account; and the Defendant in his Rejoinder setting forth, That he did give an Account, there is an Issue joyned; wherefore it ought to have been concluded, & de hoc ponit se super Patriam.

But these Matters were Over-ruled.

For as to the first, the Court held it no Departure, but a justification of the Bar: for shewing that he was Robbed, is a giving an Account.

And as to the second, the Conclusion is proper; because the Defendant alledges New Matter, and therefore ought to give the Plaintiff liberty to come in with a Surrejoinder and answer to it; for he doth not only say, that he gave an Account, but sets forth the Special Matter, how.

Wherefore the Court gave Judgment for the Defendant.

Note, A Clerk of the Court must appear de die in diem, to any Matters against him on the Crown side, as well as on the Plea side.

Reynell *versus* Heale.

An Information was brought upon the New Statute against Conventicles; for that the Defendant being a Justice of the Peace in Devonshire, and Complaint being made to him by Reynell of a Conventicle, he refused to go to the place to suppress it; and sets forth three Omissions of that kind, and that the Statute Enacts, That a Justice of Peace, for every such neglect of doing his Duty, shall forfeit 100 l. the one Moiety to the King, the other to the Informer; & *unde actio accrevit* for 100 l. to the King and himself.

The Defendant pleads non debet the said 100 l. to the Informer, nec aliquam inde parcellam, & de hoc ponit se super Patriam, & prædict Reynell similiter.

And upon this Issue Verdict was given for the Informer.

Jones moved in Arrest of Judgment, That he conceived there were no words in the Act to oblige the Justice of the Peace upon such Information, to go in person to the place where such Meeting is; and 'tis not said here, that he refused to grant a Warrant, or the like.

But he did not much insist upon that, but moved that the Issue was not well joyned; for it is only between the Informer and the Defendant, and so the Plea is quod non debet to the Informer, and no mention of the King; whereas the Action is qui tam, and the Act gives the Moiety of the Penalty to the King.

The Court said nothing to the first matter, but held clearly that the Issue was misjoyned; and said, that a Repleader ought to be awarded.

Polexfin and Ashford *versus* Crispin.

Hill. 22 & 23 Car. 2. Rot. 225. The Plaintiff brought Trespass, Quare pisces suos cepit in separali Piscaria.

Upon Not Guilty pleaded, and Verdict for the Plaintiffs, it was moved in Arrest of Judgment, that the Plaintiffs ought not to have called them Pisces suos, unless they had been in a Trunk or Pond:

For

19

for there is no more property in Fishes in a Several Piscary, than in a Free Piscary.

In an Action for taking of Conies in a Warren, he shall not say Cuniculos suos; and this is such a default as the Verdict shall not aid. Sed non allocatur. 5 Co. 34. b.
F.N.B. 191,
193.
2 Cro. 195.

For the Chief Justice said, it might be intended a Stew Pond, which is a mans Several Piscary; and after a Verdict the Court shall admit any Intendment to make the Case good.

And Twiden cited a Case which was in Trespass, Quare Phasianos suos cepit, and the Plaintiff had Judgment after Verdict; for it shall be intended they were dead Pheasants. And the Case of Child and Greenhill, 3 Cro. 553. is the same with this.

But the Court held, that it had been good upon a Demurrer, by reason of the local Property: And so is the Register.

Hoskins versus Robbins.

In Replevin the Defendant avowed for Damage feasant.

The Plaintiff Replies and saith, That the place *Where* is parcel of the Waste of such a Mannor, within which Mannor there are Copyholds demisable time out of mind; and that the Copyholders have had time out of mind the sole Feeding of the said Waste; and that J. S. being a Copyholder of the said Mannor, Licensed him to put in his Cattel.

The Defendant traverses the Prescription, and it was found for the Plaintiff.

Levins moved in Arrest of Judgment that Prescription to have the sole Feeding, whereby the Lord shall be excluded from all the benefit of his Soyl, is not allowable; and the Lord cannot in this case ever make any profit of the Mines, for he may not Dig. 1 Cro. 434.
2 Cro. 256.

'Tis true, a Prescription may be, to have the sole Feeding from such a Day; for there the Owner hath his time also.

Again, He alledges a Custom of Dimising Copyholds, and doth not say for what Estate, neither doth he name any Copyholders. Also, he should have averred, that the Beasts were levant and couchant.

One prescribed to have omnes Spinās, yet laid them to be spent in a certain House. And the Verdict shall not help the Defect, as this Case is; but if the Copyholder had pleaded so himself, it should: for after a Verdict it is intended they were levant and couchant; but that cannot be in case of a Stranger Justifying by Licence.

He took another Exception also, That a Licence was pleaded here, and not shewn to be by Deed, as it appears it ought to be, 2 Cro. 575.

As to the first it was Answered, That this Prescription did not take all the Profit from the Owner of the Soyl, for there might be Trees and Bushes growing; and if any one should Dig the Soyl and discover Mines, the Lord should recover Damage in respect of the Mines. Such an Interest as this might commence by Grant, and therefore lies in Prescription. The same Objection might be made against the sole Feeding for some part of the Year; for the property of the Soyl remains in the Lord at that time also, when the Profit is divided from him, and it may be as well allowed for a longer as a shorter time; this is no more than the Herbage or Pasture of the Land. And Prescription to dig Turves cuts as deep into the Profits; and yet that may be in one, and the Soyl in another.

As to the second, It is not needful to shew for what Estates the Copyholds have been demised; for it is not laid by way of Prescription in them (for then it would be material to shew that they had such Estates, as might suppose a Prescription;) but as a Custom in the Mannor; and to have named them would have made a Repugnancy, (viz.) that such particular Copyholders had the sole Feeding time out of mind, 3 Cro. 211.

Yelv. 187.

Neither is it needful to alledge, that the Beasts were levant and couchant, in regard that he claims the sole Feeding, which may therefore be with what Beasts he pleaseth.

And it is not needful, that the Licence should in this case be by Deed; for it passeth no Interest, and serves but for an Excuse of Trespass; and 'tis for no certain time, but only pro hac vice.

The Opinion of the Court inclined for the Plaintiff. Sed Adjournatur. Vide postea.

The Duke of Richmond *versus* Wife.

In an Ejectment the parties had a Trial at Bar, and a Verdict for the Plaintiff.

The Court were moved to set aside this Verdict, upon an Affidavit made of these Misdemeanors in the Jury, (viz.) That they had Bottles of Wine brought them before they had given their Verdict, which were put in a Bill together with Wine and other things, which were eat and drank by the Servants of the Jury, and the Tipstaves that attended them at the Tavern where they were consulting their Verdict.

That this Bill (after the Verdict given) was paid by the Plaintiffs Solicitor; and that after they had given up their Privy Verdict, they were Treated at the Tavern by the Plaintiffs Solicitor, before their affirmance of it in Court.

Counsel being heard on both Sides, as to these matters, the Court delivered their Opinions seriatim, that the Verdict should stand.

They

They said they were not upon a discretionary setting aside of the Verdict, as when the Jury goes against Evidence; but whether these miscarriages shall avoid it in point of Law.

They all agreed, That if the Jury eat or drank at the charge of the party for whom they find the Verdict, it disannuls their Verdict; but here it does not appear, that the Wine they drank was by the order of the Plaintiff, or any Agent for him.

'Tis true, in regard his Solicitor paid for it afterwards, it does induce a presumption that he bespoke it; but that again is excused, by its being put into a Bill with other things that were allowable; and if the Verdict should be quashed for this Cause, it must be entered upon the Roll, that it was for drinking at the Plaintiff's charge, and it is not proved, that this Wine was provided by him. Cro.616.

And as to the other matter, That they received a Treat from the Plaintiff after their Privy Verdict given, and before it was given up in Court, that shall not avoid their Verdict.

But if the Defendant had treated them, and they had changed their Verdict, as they might have done in Court, it should then have been void, Co. Lit. 227. b. If after the Jury be agreed on their Verdict, (which the Chief Justice said must be intended, such an Agreement as hath the signature of the Court put upon it, (viz.) (A Privy Verdict.) They eat and drink at the charge of him for whom they do pass it, It shall not avoid the Verdict, and it should, The Court said most Verdicts given at the Assizes would be void; for there is usual for the Jury to receive a Colation after their Privy Verdict given, from him for whom they find. But such practice ought not to be, and if any of the Parties, their Attorneys or Solicitors speak any thing to the Jury, before they are agreed relating to the Cause, (viz.) That it is a clear Cause, or I hope you will find for such an one, or the like, and they find accordingly, it shall avoid the Verdict; but if words of Satisfaction, or the like pass between them, (as was endeavoured to be proved in this Case) they shall not. Also if after they depart from the Bar any matter of Evidence be given them, as Depositions or the like, tho' the Jury swear they never looked on them, yet that shall quash their Verdict. But they all held in this Case, that tho' there was great matter of Suspicion, yet there was not matter of clear proof (as there ought to be) sufficient to disannul this Verdict; but they said it was a great Misdemeanour in the Jury, for which they ought to be fined; and that the Plaintiff's Solicitor had carried himself with much blame and indiscretion; and the two Tipstaves which attended the Jury, for that they were not more careful, but connived at these matters, were fined, the one 40 shillings, (who appeared to be most in fault) and the other 20 shillings. Barnard

Barnard *versus* Michell.

Hill. 22. & 23 Car. 2. Rot. 865. The Case was moved again, and by the Opinion of all the Court, Judgment was given for the Plaintiff, being after a Verdict.

For though the pleading, that he brake all the Covenants, would not have been good upon a Demurrer, as they said, for two Reasons;

First, for that it would have been double, in regard that the breach of any one of them would have intituled the Plaintiff to the penalty.

Secondly, for that some of the Covenants were such as he ought to have assigned a special breach upon, that it might have been in the Judgment of the Court; yet now the Verdict hath aided these defects.

Pellow *versus* Kingsford.

In an Action of Debt sur l' Estatute 2 E. 6. for not setting out of Tythes. After Verdict for the Plaintiff, it was moved in Arrest of Judgment.

Vid. 2 Cro.
68.
Yelv. 63.

That the Lands out of which the Tythes were demanded, were shewn in the Declaration to lie in two Parishes; so that the Plaintiff ought to have made several Titles, and also have shewn how the Tythes should have been set out upon the Land, (viz.) how much in one Parish, and how much in the other.

But it was held to be well enough, for this Action is but in the nature of Trespass, and to punish the Tort in not performing the Statute.

Anonymus.

In an Information upon the Statute of Usury. After Verdict at the Assizes for the King, it was moved in Arrest of Judgment, That the Venire was not well awarded, for it was entered *ideo ven' inde jur'*; whereas it should have been *præceptum est Vicecomiti, &c.*

The Court commanded to search Presidents, and were informed that they were generally so.

Anonymus.

Anonymus.

A Prohibition was prayed on the behalf of a Churchwarden to the Ecclesiastical Court, for that they tendered him an Oath upon these Articles following.

First, Whether any Person within his Parish, hath Encroached upon the Church-yard?

Secondly, Whether any Person within his Parish were an Adulterer, or Filthy Talker, Sower of Sedition, Faction, or Discord amongst their Neighbours?

Thirdly, Whether there were any which did not resort to their Parish Church, receive the Sacraments, &c.?

It was said to the first of these, That it concerned Matter of Freehold. But this was Overruled, for they may take notice of Encroachments upon the Church-yard.

And to the second; Sowing of Sedition amongst Neighbours, is inquirable in the Leet, and the Bishops Court hath nothing to do with it. Besides, This Oath would oblige him to charge himself Criminally; for it is whether any person within the Parish, &c. so that himself is included.

And as to the Sowing of Discord, The Court held it did not belong to them.

But they held, That the general words would not extend to the Churchwarden himself; but intended to relate only to the rest of the Parish.

But upon examination of the matter it appeared, That the Oath tendered was only in general words, (Viz.) To make Presentations according to the Kings Ecclesiastical Law. And these Articles were offered only by way of direction, & quasi a charge. Wherefore the Court denied the Prohibition.

Anonymus.

In Replevin of Beasts taken at D. the Defendant pleads in Abatement; that they were taken in another place; absque hoc, that they were taken at D. Et pro Return habend', he Avows for Rent reserved upon a Lease. The Plaintiff replies, and Traverses the Lease, which should not be; for though the Defendant when he pleads such a Plea in Abatement, must also Avow to have a Return; yet the Plaintiff cannot answer to it, but must take Issue upon the other Matter. 1 Cro. 896.

Sir

Sir William Smith *versus* Wheeler.

In Error upon a Judgment in the Common Pleas in Ejectment, for the Rectory of Hadnam in the County of Bucks, where the Jury found as to a third part of the Rectory, the Defendant Not guilty.

And to the other two parts, a Special Verdict to this effect.

That Simon Maine was possessed of the two parts of the Rectory for 80 years, and in the year 1643 made by Indenture, an Assignment of them to Crook and Bleak upon these Trusts following, (viz.) In trust for himself for Life, and after his Decease for the payment of his Debts, and for the raising of several Sums to be paid to divers of his Kindred. *Proviso*, That if he shall at the time of his Death leave a Child, or his Wife *Enfeint*, then that it shall be to such Trust and Use as he shall limit and appoint by his Will, and if he made no such appointment, then to be in Trust for such his Issue. Provided further, That if *Simon Maine* should be minded, or willing at any time to make void the present Indenture, or to Frustrate any Use or Trust therein, or create any new, or to dispose the Estate to any other person, or any other way, and such his purpose shall declare by Writing, under his Hand and Seal before Witnesses, &c. that then, and thenceforth the Trusts therein, &c. or so many of them, &c. should be void, &c.

Then they find that in 1644 he had Issue a Son, and that he took the profits thereof during his Life, and made several Leases of the Premises.

That the Assignees had no notice of this Trust during his Life, and that after his Death one of them assented, and the other dissented to it.

They find that in 1648 he committed Treason, and was there of Attainted.

They find the Act of 12 Car. nunc. cap. 30. Whereby it is Enacted, That all Mannors, Lands, &c. Leases for years, &c. which he or any to his use, or in trust for him had, 25 Mar. 1646: or at any time since, shall stand and be forfeited, &c. and also all Rights and Conditions, &c.

They find that the said Simon Maine died in 1661, and that the King made a Grant to Sir William Smith the Plaintiff.

It was adjudged for Wheeler in the Common Pleas, Pasch. 20 Car. 2. by Tinel and Archer, who were then the only Judges in the Court; and Sir William Smith brought a Writ of Error in this Court, and after divers Arguments at the Bar, the Judgment was affirmed this Term, by the Opinion of the whole Court.

Moreton.

Moreton. I shall say nothing to the marks of fraud found in the Verdict; for tho' at first the Counsel of the Plaintiff insisted; that the Court ought thereupon to adjudge the Settlement fraudulent; yet it hath been since by them declined, wherefore I shall waive that.

The matter is, whether there be any thing forfeited longer than the Life of Maine.

It hath been objected, That in regard Simon Maine had a power of altering the Trusts, and disposing of them otherwise, that this should amount to an implied Trust in him of the whole Term; but that cannot be, for after his Decease, the Trust is expressly limited to others.

'Tis true, he had a power of disposing, but that was to be executed at Election, and by such Circumstances as were indubitably proper to himself.

For it was to be done by his Will, according to the first Proviso. And by the second, to be done by Writing under his Hand and Seal; so not like to Englefields Case, in the 7 Co. i. b. where the power of Revocation was to be executed by the tender of a Ring, which any one might do as well as the party himself.

But indeed this is the same case, with the D. of Norfolks cited in the same Report; and the Statute of the 33 H. 8. of Forfeiture upon that Attainder, was penned as amply as this of 22 Car. and the Case of Warner and Harding, Latch. 25. is very like this: W. Shelley enfeoffed others to the use of himself for Life, and afterwards to divers others upon Condition, that if a Ring were delivered by the said William Shelley, declaring that he intended those uses should be void, that then, &c. It was resolved, that nothing was forfeited, but during his Life.

Rainsford. I shall speak nothing to the fraud, because that is a pure matter of Fact, which is to be found by the Jury, and cannot in any Case be presumed by the Court.

I am of Opinion, that the Judgment ought to be affirmed.

The power of altering the Trusts reserved by the first Proviso, is inseparable from the person of Simon Maine, for it is to be by his Will; in Moor 193. the Lord Pagetts Case. It is resolved, that inseparable Powers are not forfeited upon like words as are in this Act, and so the second Proviso limits to him a double Power.

First, Of revoking the old Trusts.

Secondly, Of limiting new. But this is to be done by Writing, under his Hand and Seal in the presence of two Witnesses, so the performance of this also is personal.

The D. of Norfolks Case is the very same, unless for that it is there under his proper Hand and Seal, and here under his Hand and Seal, which certainly is all one.

But

But admitting this Power were forfeited, yet it is not found, that ever it was executed after it came to the King, which must be before any Estate could come to the King; therefore in Englefields Case it was found, that a Ring was tenured in the behalf of the Queen.

And whereas it was objected, That he had *jus disponendi*, and therefore might forfeit, as a Man shall a Term which he hath in right of his Wife, as Dame Hale's Case in Plowden is resolved. I answer, That here he hath not *jus disponendi*, but rather *potestatem disponendi*, but that is qualified, and to be executed by certain Circumstances, which must be performed to give it effect.

Twisden. As to the fraud, I cannot see how the Jury could have found this a fraudulent Settlement, made to prevent a forfeiture enacted by Parliament 20 years after, which surely could not be without the Spirit of Prophecy.

I am of the same Opinion, as to the matter, with my two Brothers.

That Simon Maine had only a Trust in him during his own Life; and if he had brought a Bill in Equity, he could have had the Estate executed no further, and therefore can forfeit no more by this Act; and it is not always, that a Man that hath power over Land hath a Trust, as we may see in Crasmers Case, Dier 308, 309. there were as large words in the Act of his Attainder as here.

Indeed the Argument in Englefields Case, 7 Co. rules this; for if a Trust had been implied in the power of Revocation, they needed to have argued, that it should have been forfeited as a Condition; so the D. of Norfolks Case; for tho' the word Use is in that Act, and not Trust as in this, yet it makes no difference, for an Use was then the same with what a Trust is now; and tho' the word Power had been in this Act, yet there should have been no forfeiture in this case, because the Execution of it is so personal and individual.

Neither is there found, that ever there was any Execution, and at most the forfeiture could only be of what was in Simon Maine; neither can Smith Execute it by virtue of his Grant from the King, for the Kings Patent conveys nothing by implication, and shall never work to a double intent.

Hale Chief Justice of the same Opinion.

First, Crooke is a good Lessor, for the other Trustees disagreement makes the Estate wholly his.

Secondly, for the Circumstances of fraud, they are not material to be considered.

Thirdly, The Trust is wholly disposed of after the Death of Simon Main, so that he had nothing but during his Life.

Fourthly,

Fourthly, Then what is operated by the Attainder? *Why* the Trust during Life is forfeited. Vid. the E. of Somerset's Case, Hob. 214. 2 Cro. 512. But then this Trust must have been executed by the Court of Revenue. 'Tis true, the Act doth not only give the Trust, but the Term it self to the King, that is, during the Life of Simon Maine; so that by this Act, so much of the Term is drawn out of the Trustees, as served the Trust which S. M. had, but leaves the residue of the Term to serve the other Trusts; so that the possibility of the Term returns to the Trustees, after the Death of S. M. and this appears by the body of the Act.

Also this appears by the saving in the Act. The first saving, which saves all the Conveyances, made by the Feoffor before the 29 of Sept. 1659. indeed might not help, because Conveyances made to the Wives, Children, or Heirs, are therein excepted. But there the other Proviso saves the Right, Interest, &c. of all persons whatsoever, both in Law and Equity, not derived from the offenders since, 25 Mar. 1646. and therein the Interest of Wife, or Children and all are saved; now this Estate was created before, (viz.) 1643. I come now to the Provisoes.

The first Proviso determines nothing till the time of Simon Maine's Death; and consequently this can revert no more to M. than he had before. For the Condition is in expectation till he have a Son living at the time of his Death; why then, by this there comes nothing to S.M. so much as in point of Execution during his Life: By his Will he might have limited new Uses, but he made none; and 'tis personal: No other Man can make his Will.

Why then all stands as it did, and nothing is made void till the time of his Death, and then all is immediately executed to the Son, by force of the first Conveyance. But if the Proviso had been, That if S.M. had a Son, there all had reverted in S. M. and might have been forfeited.

The last Proviso doth not create a Trust to him, for if he had not been Attainted, the Trust should not have gon to his Executors, &c. No, it creates a personal power of fetching back the forfeiter, and declaring new Trusts, observing the circumstances; upon the same reason, that this Estate can be forfeited, a bare Executor, (I mean, without a Devise of the residue) might forfeit his Estate; this is a Power, yea, and 'tis a manacled Power, it is a kind of Trust that he may revoke.

The D. of Norfolk's Case is the same with this: So Harding and Warners Case which was adjudged in C. Banco, tho' there there were two to two, and it was confessed by the Kings Attorney in Scaccario, and the Kings Attorney doth not use to confess Judgment in Cases of great moment, without consultation with the Judges. This power was not, nor could be passed to the King by general words of all Land, &c. Conditions, &c. 3 Co. 2. a. b. much less

could it pass from the King, (if it could pass at all) by general words; but I rest upon this,

First, That it is a Power of kind of Trust to revoke, but no Condition.

Secondly, At least, not such a Condition as is given to the King.

Thirdly, If it were, it ought to have been executed by the same means, as it should have been by S. M.

In Englefields Case there was no pretence to have more than to execute the Condition; it ought here to have been executed in the Life of S. M. and so it appears to be done in Englefields Case, and Harding and Warners Case, for I caused the Cases to be searched: This is like the Case of the Statutes of 15 R.2. cap. 5. 1 R.3. cap. 1. 19 H. 7. cap. 15. these Statutes give the same advantage to Lords, &c. where persons have Uses in Lands respectively, as if they had the very Lands; but the Lord's, &c. cannot thereby claim any greater Interest than the cestuy que Uses had respectively in the Uses.

Now in this Case, The Body of the Act and the Proviso fetch back and save the Trusts for all but S.M. As to the Execution for the Kings Debts it differs for the Process; for they ever did, and do run de terris de quibus illi aut aliquis ad eorum usum, &c. 'Tis true, in Sir Charles Hattons Case it was resolved, That the Kings Debt should be executed upon Land, wherein he had a power of Reversion. Vid. Chirtons Case, 11 Co. 92. And so Judgment was affirmed per totam Curiam.

Termino Sanctæ Trinitatis, Anno 22 Car. II.

In Banco Regis.

Anonymus.

In Debt upon a Bond. After Verdict for the Plaintiff, the Judgment was entered quod recuperet the Sum pro misis & custag, instead of pro debito præd'. But this was ordered to be amended, as the default of the Clerk, tho' in another Term; The Court having power over their own Entries and Judgments.

Anonymus.

Anonymus.

In an Account, it was held by the Court, that if a man delivers Money to his Bayliff or Factor, to lay out for him in Commodities, he cannot bring an Assumpsit, but only his Action of Account.

For the Chief Justice said, that he knew such an Action once brought, and the Jury that were to try the Cause informed him, That if they should Examine all the Accounts which were between the Plaintiff and Defendant, it would take up three or four days time. So that it hath been always holden, that in such case he should be driven to his proper Remedy, which is an Action of Account; and it may be the Factor hath laid out more Money than he received.

Eaton *versus* Barker.

In an Action upon the Statute of 17 Car. nunc, for residing in a place where he had formerly kept a Conventicle, and demands the 40 l. penalty.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that there was no Costs or Damages given: For it was said, that where a Statute gave a certain Penalty, if this be not paid upon demand, he that sues for it shall recover his Costs and Damages; as North and Wingate's Case in the 3 Cro. 559. is.

But the Court held, that they ought not to be given in Actions Popular, whether the Forfeiture be certain or not; but where a certain Penalty is given to the party grieved, there he shall recover his Costs and Damages, 10 Co. 116. Vide postea.

Polcxphen *versus* Polcxphen.

In a Prohibition; the Case was, that Henry Polcxphen died Intestate.

Andrew his Brother gets Letters of Administration in the Inferiour Diocesis.

One who pretended to be the Wife of H. surmizing Bona notabilia, procured Administration from the Prerogative Court.

Andrew appeals to the Delegates, and dies.

Henry his Son and Heir comes in, and gets the Administration (committed in the Prerogative Court) Repealed, and hath Letters granted to himself.

Upon this the Wife prayed a Prohibition, supposing that the Delegates could not proceed after the death of Andrew; but that their Commission was determined: For their Authority is by that, to proceed in a Case between such parties, one of which is dead.

Co

To which it was Answered, That the Commission is to hear and determine the Cause. And both in the Civil and Ecclesiastical Law, the Suit shall continue after the death of either party for those which shall be concerned, as appears by the Bishop of Carlisle's Case in 2 Cro. 483. And in the 1st Leonard 117, and 178. it is said, That if one party dies ante litem contestationem, then it shall abate; but if after, it is otherwise. And there are a number of Presidents of this nature both in the Arches and Admiralty Courts, &c. And in this very Case Henry Polexphen having obtained Administration de bonis non of his Uncle Andrew in the Country, the now Plaintiff got it set aside by the Delegates, because granted while an Appeal was depending, and that upon full debate before them, who would yet now suggest, that the Appeal was determined by the death of Andrew.

The Court were of Opinion, that no Prohibition was to be granted, and that the Delegates Authority to proceed in that case continued, notwithstanding the death of Andrew: For the Commission is to proceed in causis Administrationis, &c. una cum suis incidentibus vel annexis qualitercunque, &c. Summariè & juxta Juris exigentiam. So that the Ecclesiastical Law is appointed to be their Rule, by the course of which a Suit doth not abate by the death of the parties.

And Hale said, The Appeal is to the King in Chancery, and it is by reason of his Original Jurisdiction, and thereupon he grants a Commission to hear it. Now if he could hear it in Person, none could object, but that he might determine the Cause after the death of the parties; and by the same Reason they may, to whom he hath delegated his Authority.

But the Attorney General coming in, and desiring to be heard in it for the Plaintiff, the Court gave further time.

Eaton versus Barker.

The Case was now moved again upon the Statute, for coming to a place where he had formerly Preached in a Conventicle. And Exception was taken to the Declaration.

For that it was not averred, that the Defendant was in Holy Orders: For the words of the Statute are, That if any one that hath been Parson, Vicar, Lecturer, &c. or within Holy Orders; and have taken upon them to Preach, &c.

But to this it was Answered, that there is another Clause in the Act, That all such persons as shall take upon them to Preach, &c. which is general, and extends to all men, whether in Orders or no, which have been Preachers. And of that Opinion were the Court.

It was also Objected, That there was no Averment: That the Defendant was not there upon Summons *Sub poena*, &c. for if so, then it is no Offence by the Act.

To which it was Answered, that if the Body of the Act were, That all persons which should resort to such place, which were not Summoned or Subpoena'd thither, should forfeit, &c. then 'tis true, it must be averred. But that matter comes, in a Proviso of the Act, (viz.) That it shall not extend to such Cases; and therefore if there were any such thing, the Defendant is to plead it.

Wherefore the Court ordered Judgment to be Entred for the Plaintiff. Ante.

Anonymus.

In an Action of Trover and Conversion: After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Action was commenced in Hillary Term, and the Conversion alledged to be the 3d of February in the same Term; and the Bill filed relates to the first day of the Term, so before the Cause of Action.

But it was Resolved by the Court, that if the Bail were Entred after the 3d Day of February, it is well enough; for it is that which gives this Court Jurisdiction.

So an Ejectment may be brought upon a Lease made in the same Term: So the Statute of Limitations may be pleaded to an Action, if the time be elapsed before the Day wherein the Bail is filed, though not before the 1st Day of the Term wherein the Action is brought: For the Action shall not be said to be depending until the Bail is filed. And upon Search it was found, that the Bail was filed the last Day of the Term.

Putt versus Nofworthy.

In Debe, the Plaintiff declared upon certain Articles, whereby the Plaintiff Covenanted to convey certain Lands to the Defendant, and in Consideration thereof the Defendant Covenanted to pay a certain Sum to the Plaintiff.

After a General Impar lance the Defendant prayed Oyer of the Deed, whereby it appeared that the Defendant and one Vincent Covenanted, that he or Vincent should pay the said Sum. And he avers, that Vincent sealed and delivered the Deed, and demands Judgment of the Bill, & si actionem poterit habere versus eum solummodo.

To this the Plaintiff Demurred; which was Entred thus: Et dicit quod ab actione predicta præcludi non debet, quia materia insufficiens, &c.

And the Defendant joins, Quod materia præallegat' sufficiens, &c. prædict' le Plaintiff ab actione prædict' præcludere.

Jones

Jones moved for the Plaintiff, that the Defendant's Plea being in Abatement, could not be admitted after an Imparance, and that a peremptory Judgment ought to be here given; because he had concluded in Bar, as well as Abatement. For he doth not only demand Judgment of the Bill, but saith, actionem habere non debet; and the Demurrer is joyned, as upon a Plea in Bar.

And it was agreed, that if a man concludes a Plea in Abatement, as in Bar; if it be against him that pleads it, Judgment peremptory is to be given. But here the Conclusion is not actionem habere non debet; but 'tis added, versus cum solummodo, So if a man begins a Plea in Abatement, actio non, &c. Judgment peremptory ought to be thereupon given.

But then it was said, That although it were too late to urge this Matter, in Abatement; yet it appeared upon the Deed shewn, that the Plaintiffs Declaration was insufficient: For it being, If the Defendant, or one Vincent should pay; and the Plaintiff alleging, that the Defendant had not paid, is not enough to intitle him to his Action, albeit that Vincent were no Covenantor, or had ever Sealed and Delivered.

To which it was Answered, and so Resolved by the Court, that it appeared by the frame of the Deed, that Vincent was as well party, as the Defendant; and it is too late now to averr, that he did Seal and Deliver; so it shall be taken that he did not, and then it remains the sole Covenant of the Defendant.

And though the words are, That the Defendant or Vincent shall pay; that is no more than the Law would have implied, if Vincent had Sealed.

And the Chief Justice cited one Cartwright's Case in Debt for Rent, where the Indenture of Lease was a Demise from Cartwright, and another Joyntenant with him, reserving a certain Rent to them both; but the other never Sealed. Cartwright brought Debt, and declared of a Demise of the Moiety, and Reservation of the Moiety of the Rent. And upon Nil deber the Matter aforesaid was Specially found: And it was moved,

First, That the Lease being by Indenture, whether the whole Rent were not well reserved to Cartwright, as by Estoppel; or whether it were not good to him, as to a Stranger, for one Moiety? or whether it should not be good to him as an intire thing, which was reserved to him as well as the other?

But the Court Resolved, that it was good only for a Moiety as he had declared: For there being an Expectation of the others Sealing, which never was done; the Deed, as to one Moiety of the Land, and the Rent reserved, had no effect. And where one Declares against one upon a Deed, whereby it appears that another was bound with him, it shall not be intended that the other

other Sealed, unless averred on the Defendants Side. Other, wise where the Declaration is upon Matter of Record.

And it was held by the Court, That if the Declaration were defective in this, yet it was but in Matter of Form: for he saith, that the Defendant did not pay, sed adhuc injuste detinet, which is an Averment, tho' unformal, that the Money is not yet paid neither by the one nor other. And so it hath been held, where in Debt against an Executor it is averred, that the Executor did not pay it, & adhuc injuste detinet, and not averred, that the Testator had not in his life time; that after a Verdict this is aided.

And they held, that a Judgment ought to be given quod respondeat ouster for the joyning Demurrer as upon a Plea in Bar, is not material; besides the fault begun on the Plaintiffs part.

Tailour versus Fitzgerald.

ERror upon a Judgment given in the King's Bench in Ireland, in Ejectment; where the Plaintiff declared, that J. S. demised to him per quoddam Scriptum Obligatorium, &c. habend' à die datus Indenturæ prædictæ.

And upon Not guilty pleaded, it was found for the Plaintiff, and he had his Judgment.

It was assigned for Error, that there was no time when this Lease should commence; for it was Habend' after the Date of the aforesaid Indenture, and there was none before, it being Scriptum Obligatorium, and not Indenturam.

But the Court Resolved, that the Writing shall be intended an Indenture, and tho' called Scriptum Obligatorium, which is improper; yet it may be said every Deed obligeth, or if it shall not be intended Indented, then the Lease shall commence presently, as if it had been Habend' from the 40th of September.

Crossing versus Scudamore.

In Trespass, Quare clausum fregit, the Defendant pleaded that the place Where was the freehold of Sir Thomas Hooke, and that by his Command he entered.

The Plaintiff traverseth, That it was the Freehold of Sir T.H. And thereupon this Special Verdict was found:

That Nicholas Heale was seised in Fee, and that 16 Dec. 1640. he made a Deed to Jane Heale, Enrolled within six Months, by which the said Nicholas did (for and in Consideration of Natural Love, augmentation of her Portion, and preferment of her in Marriage, and other good and valuable Considerations) give, grant, bargain, sell, assen, enfeoff and confirm unto the said Jane Heale, and her Heirs. Then they found there was a Covenant, that the

said Jane Heale should, after due Execution, &c. quietly enjoy, &c. and also a special Clause of Warranty. And that the Deed was Enrolled within six Months, and that there was no other Consideration of making the Indenture, than what was expressed. And if it were sufficient to convey the Premises to the said Jane, they found for the Plaintiff; if not for the Defendant.

And it was Argued by Winnington for the Plaintiff. He agreed that it could not take effect as a Bargain and Sale, because no Money was paid; but Argued, that the Deed should enure as a Covenant, to stand seized.

It is a Ground in the Law, that the intention of the parties ought to guide the raising of Uses, and the Construction how they shall enure, Co. Lit. 49. Rolls 2d part 789. and to give the effect the words shall be disposed to other Construction than what otherwise they would import. As if a man demises, grants and to farm-lets certain Lands in Consideration of Money, and the Deed is Enrolled; this is a good Bargain and Sale. So if a man Covenants in Consideration of Money, to stand seized to the use of his Son, 8 Co. 93. Foxes Case, 2 Rolls 789. it is said, *Nota per Cur'*, if it appears that it was the Intent of him that made the Deed, to pass the Estate according to Rules of Law, it shall pass though there be not formal Words.

Again, the Consideration expressed in this Deed, is purely applicable to a Covenant to stand seized, and a Deed shall enure upon the Consideration expressed rather than upon one that is implied. As in Bedell's Case, 7 Co. 40. If the father in Consideration of 100 l. paid, Covenants to stand seized to the use of his Son, and the Deed is not Enrolled, nothing shall pass: But where there are two Considerations expressed, there the Use may arise upon either. As if the father, in Consideration of Blood and 100 l. paid by the Son, Covenants to stand seized, &c. and the Deed is not Enrolled; yet the Use shall arise as upon a Covenant to stand seized, Pl. Com. 305. And so it was Adjudged between Watson and Dicks in the Common Pleas, 1656. The father by Deed, in Consideration of Love and 100 l. paid by the Son, conveyed Land to him, with a Letter of Attorney in the Deed to make Livery; in that case the Son hath his election to take by the Enrolment or Livery, which shall be first Executed, 2 Rolls 787. pl. 25.

But it hath been Objected here, that there is a Clause of Warranty in the Deed, which shews that the parties intended a Conveyance at the Common Law; for if it enure by way of Covenant to stand seized, the Warranty can have no effect but to Rebut. Also there is a Covenant, for quiet Enjoyment after Sealing and Delivery of the Deed, and due Execution of the same; which

which shews the parties had a prospect of Executing it by Livery, &c.

To which he Answered, That such remote Implications as those shall never make a Deed void against an expresse Consideration, upon the which an Use may arise. 'Tis true, if there had been a Letter of Attorney in the Deed it might have been void, unless Livery had followed. As if the Father by Deed grants Land to the Son, and a Letter of Attorney in it to make Livery; if none be made, nothing passes, Co. Lit. 49. a. The Authorities which have been cited on the other side are, first, Pitfields and Pierce's Case, 2 Roll. 789. where the Father by Deed Poll, in Consideration of Blood, did give, grant, &c. (as in our Case) to his Son Habend' after his decease, and a Proviso in it, That the Son should pay a Rent during the Father's Life.

It was Adjudged, That the Lands should not pass in that Case by way of Covenant to stand seised. But in that Case the Conveyance was repugnant to the Rules of Law, for that it was Habend' the Land after the death of the Grantor, and also repugnant in it self. For notwithstanding that it reserves the Land to the Father during his Life, yet it provides for a payment of Rent to him; wherefore the Law would not help out a Deed so contradictory and repugnant by way of raising an Use.

The other Case relied upon, is between Foster and Foster, Hill. 13. of this King, in this Court, in Ejectment. The Case was; The Mother, for divers good Considerations and 20 l. paid, did by a Deed, which was Entituled, Articles of Agreement, demise, grant, bargain, sell, assign and set over, to the Son and his Heirs for ever, certain Lands; the said Margery the Mother quietly enjoying the Premises during her Life.

The Court Resolved, that it should not amount to a Covenant to stand seised; for they were but intended as Articles of Agreement, and preparatory for a further Conveyance. So the Case differs very much from ours, as also that it reserves the Land to the Mother during her Life.

The Case also of Osborn and Bradshaw in 2 Cro. 127. hath been cited, Where the Father, in Consideration of Love which he bears to his Son, and for Natural affection to him, bargained and sold, gave, granted and confirmed Land to him and his Heirs; the Deed was Enrolled. It was held, the Land should not pass unless Money had been paid, or the Estate executed. This Case cannot be urged as any great Authority; for it appears that the Son was in possession. Therefore the Court Adjudged, that the Deed should be a Confirmation: and it being clear that way, they had not much occasion to insist upon or debate the other Point. And he relied upon Debb and Peplewell's Case; as an Authority in the Point, 2 Rolls 78.6. where there was a Clause of Warranty in

the Deed, and an Enrolment within six Months, as in the Case at Bar: But they Resolved there, If a Letter of Attorney had been in the Deed, it should not have been construed a Covenant to stand seised; and therefore he prayed Judgment for the Plaintiff.

Finch, Attorney General, contra. The Lands here cannot pass by Bargain and Sale, there being no Money paid, which I find is admitted by the other Side; neither shall it amount to a Covenant to stand seised. There are five things necessary to raise an Use by way of Covenant:

First, A Sufficient Consideration.

Secondly, A Deed; as in Callard and Callard's Case, in 3 Cro. and in Popham's Reports; and hath been often Resolved since.

Thirdly, A Seisin in the Covenantor of the Lands at the time of the Deed: For a man cannot Covenant to stand seised to an Use of Lands, which he shall after purchase.

Fourthly, A Clear and apparent Intent.

Fifthly, Apt and proper Words. And the two last things are wanting in our Case.

I agree, the word Covenant is not necessary, so there be other Words sufficient in Law, and to declare the parties Intent; for all Words will not serve. A man Covenanted upon good Consideration, that his Feoffees should stand seised: It was Resolved, that no Use should arise upon it, 1 Cro. 856. So Sir Thomas Seymour's Case, Where a Covenant was upon good Consideration to levy a Fine to certain Uses, and no Fine was after levied: It was Resolved, that the Covenant did not raise any Use, Dyer 96. Therefore 'tis usual to express in such Deeds of Covenant, that if the Conveyances therein contained be not executed, that then the party shall from henceforth stand seised. And where it is said in Vivian's Case, Dyer 302. One having given, granted and released to his Brother and his Heirs certain Mannors, and no Livery made, that Plowden would have averred that the Deed was made pro Fratre suo amore, and so should raise an Use. Under the favour of the Court I deny that Opinion of Plowden to be Law. And in Debb and Peplewell's Case it is said, That the Land was enjoyed against the Release. And in Moor, pl. 267. One Covenanted in Consideration of Marriage, to let his Land descend, remain or come to his Daughter: It was Resolved, no Use did arise thereupon.

In this Conveyance there are not any Words that sound in Covenant; the only word that looks towards an Use is the word Bargain and Sell. And in Ward and Lambert's Case, in 3 Cro. 394. it is held, That if one gives, or bargains and sells Land to his Son, it shall not amount to a Covenant to stand seised, for want of apt Words.

Now

Now the other are all words of Common Law, Give, Grant, Alien, Enfeoff and Confirm. There is also a clause of Special Warranty in the Deed, and a Covenant to make further assurance by Fine, Recovery, &c. as great a preparation at Common Law as could be. And if the Parties intend the Land shall pass at the Common Law by Transmutation of Possession, there shall no use arise; Co. Lit. 49. Charter of Feoffment to the Son, it shall raise no use if no Livery be made.

The word Dedi in this Deed, imports a General Warranty, which is not qualified by the Special Warranty after; yet if the Land pass by way of use, there can be only a Rebutter, and so no use of the General Warranty. The Authorities since have not been concurrent with Debb and Popshells Case, but contrary to it. And I rely upon the Cases of Piescild and Pierce, and Foster and Foster in this Court, which have been remembered on the other side; but not answered. And whereas it is said, That the Habend. is after the Death of them which conveyed the Land; they are in that respect stronger than the Case at Bar; for by that it appears; they could not intend a Conveyance at the Common Law, which doth not allow such kind of Limitations, therefore it must be by way of use, or no way: Yet it was resolved they should not pass so.

It would introduce universal ignorance and carelessness, in such as draw Conveyances, if the Court should apply their Art to give them effect however they were penned; and it is a Rule Politia legibus, non leges Politis adaptantur.

The Court after hearing the Case twice argued, were all of Opinion, That the Land should pass by way of Covenant to stand seized; and Hale cited Hob. 277. who doth there commend the Judges who are curious, and almost subtil to invent reasons and means to make Acts effectual, according to the just intent of the parties.

They all held clearly, That words proper for a Conveyance at Common Law would raise an Use, as Demise and Grant have been adjudged to amount to a Bargain and Sale without other words; And they said Piescilds and Pierces Case, was adjudged upon the absurd contrivance of the Conveyance, and so Foster and Fosters Case in this Court; and for that in that case the Deed was Articles of Agreement, preparatory to what the party intended after; and the case in Moor Pl. 267. where there was a Covenant in Consideration of Marriage, to suffer the Land to remain, descend or come to the Daughter; no Use did arise there, for the incertainty how it was intended the Daughter should take.

And

And they said, That if they should not construe an Use to arise by such Conveyance, as in the case at Bar, it would overthrow all Conveyances by Lease and Release.

And for the Objection of the Warranty in the Deed, it is well known there is so in most Conveyances to Uses. Wherefore they gave Judgment for the Plaintiff.

Note, This Judgment was afterwards affirmed upon Error, brought in the Exchequer Chamber.

Anonymus.

An Indictment was brought, for using of a Trade to which he had not been bound an Apprentice.

It was moved to quash it, because it was not alledged, that he did not use the Trade 5 Eliz. for if he did, he is excepted out of the Statute.

But the Court did not much regard that exception, Tho' they said it had been often allowed; but it cannot here be intended, it being so long since the Statute was made.

Secondly, It was for using the Trade Aromatarij, without an Anglice; so it could not be known what Trade was meant, and tho' that word is often used for a Grocer, yet it must be so Englished, or else it shall not be taken for that Trade more than another.

And for this Cause, the Court quashed the Indictment.

Note, If a Man be taken upon a Warrant de securitate pacis, or any criminal cause, he is not to be charged with Actions, unless the Court gives leave, which they will rarely do.

The Case of the Heirs of the Earl of Southampton.

King James by his Letters Patents Enrolled in this Court, granted to the E. of Southampton, all Deodands within the Mannor of Ditchfield.

An Inquisition was certified here, that a Deodand was forfeited within the said Mannor, and Process went out thereupon.

The Court were moved in behalf of the Daughters and Heirs of the Earl, whether they should be driven to set forth their Title in pleading; for if so, the charges would far exceed the value of the Deodand, and it would be very inconvenient, that every new Heir should be forced to plead upon every Deodand that happens.

But the Court said, in regard the Letters Patents are here Enrolled, and that it appeared by the Inquisition, that this Deodand was forfeited within the Mannor, it should suffice without pleading, if the Heirs satisfied the Office of their Title without pleading, as where Cousins of Pleas have been once allowed; it is sufficient

ent in another Action to shew the former Roll where it was allowed.

Note, An Indictment for a Nuisance in the High-way. The Court will not quash this Indictment upon Motion, unless certified that the Nuisance is removed.

But they will Reverse it upon a Writ of Error, (if there be Error in it) without any such Certificate.

Hes Case.

A Mandamus was prayed to the Churchwardens of the Parish of Kinsmore in Hampton, to restore John Hes to the place of Sexton there, and it was granted.

And so the Court said hath been for a Parish Clerk, Churchwardens, a Scavenger.

But it was denied to one, who pretended to be Master of the Lord Mayors Waterhouse; for that they said was not an Office, but a Service.

Anonymus.

A Fine was levied of Lands in Blandford Forum. Resolved, That this should not pass Lands in a Hamlet of that Town, there being Constables distinct in Blandford Forum, from others that were in the Hamlet; so that they were as two Villages.

But if a Fine be levied of Lands in a Parish, it shall extend to all the Villages within the Parish.

The Lord Hawley's Case.

A Mandamus was granted, to restore him to the Recordership of Bath.

The Corporation returned, That they were Incorporated by Letters Patents of Queen Elizabeth, which empowered them to chuse *probum & discretum hominem in legibus Angliæ peritum* to be their Recorder, and to hold a Court twice every Week before the Mayor, Aldermen and Recorder, or any two of them, whereof the Mayor to be one.

That the 1st of August 15, of this King he was made Recorder by the Committee, upon the Act of this King for regulating of Corporations; and that he continued in the Office, *Secundum locationem illam* until the 25 of December 21 of the King, and that from the 1 of August 15, of the King, to August 21 he absented himself; by the space of five years without any reasonable Cause, and that he is *nullo modo peritus in lege*; and that at a Court August the 21, they

they summoned him to appear some days before, and he not coming, they amoved him from his Office, the 30 day of the said August.

After this Return filed it was moved.

First, That it was repugnant, for they returned, That the Lord Hawley continued in his Office until the 25 of December 21 of the King, and after that they amoved him in August 21 of the King. To which it was answered, That in regard upon the whole return it appears, that he was amoved, though it be said he continued after, that is not material but surplusage. As where a Jury gives a general Verdict, and yet discloses special matter disagreeing to it; the Court judges according to the special matter; or else they might mean that though he were turned out, yet he did continue exercising it de facto. And the Court were of Opinion, that the contradiction in the Return was not material: for Hale said, If it shall be taken that he is yet in, then there is no need of a Mandamus.

Again it was said, That the matter of absence was not sufficiently returned; for it appears by the Charter, that the presence of the Recorder is not necessary to the holding of the Court; for it is to be held before the Mayor, Aldermen and Recorder, or any two of them, whereof the Mayor to be one; then they have not returned, that they held a Court in all that time, neither have they returned, that any mischief, or inconvenience happened to them by his absence.

A Park-keeper shall not forfeit his Office for Non-attendance, unless a Deer be killed or the like in his absence. Also it is returned from the 1 of Aug. 15. Car. to the 1 of Aug. 21. he absented himself for five years, and he might be out of Town five years in six years time, and yet be there every Court day.

And for the other cause of removal, that he was not peritus in lege; It was said, That the Corporation being Laymen, could not return a thing whereof they were not Judges: That the Return was too general, nullo modo peritus; but ought to have set forth some special Fact, whereby it might appear to the Court.

Also, They could not remove him for a Cause which they could not examine; he was put in by Commissioners, authorised by Act of Parliament, which it was said did capacitate implicitly him, at least their Act supplied the Election of the Town, which if it had been, would have dispensed with his disability. And the Case of Bernardiston, Recorder of Colchester was much relied upon, who in 1655, brought a Mandamus to be restored to his Office. And it was returned, That he was not learned in the Law, and that one being indicted before him, upon the Statute of 1 Jac. of having two Wives, and convicted he denied him
Clergy;

Clergy; and also they returned, That he absented himself for nine Months; and notwithstanding, by the Judgment of the Court he was restored.

It was said by Sir William Jones on the other side, That the absence as it was returned, was sufficient Cause to remove him; for it is returned, That without any reasonable Cause seipsium elongavit, by the space of five years, which must be intended five years continued, and not made up by Fractions; (and so held the Court in that Case) and executionem officij sui totaliter neglexit: Now, tho' his Presence be not of absolute necessity to the holding of the Court, yet it is highly convenient that he should be there, seeing the Charter gives such large Jurisdictions, to determine all Causes, (excepting such as concern Freehold) according to Law.

The Court here also must judicially take notice, That the Office of Recorder is concerned in other matters, besides the Administration of Justice in the Court; for he is as it were the Common Counsel of the Corporation.

And whereas it hath been objected, That it is not returned, that they had held a Court during his absence, or that any prejudice had ensued.

Also, That it must be intended that there were Courts, when they have returned the Charter, which empower them to hold one twice every week; and 'tis returned, That he absented himself in Regiminis Civitatis detrimentum, &c. and 'tis apparent they must suffer prejudice by so long absence. If a Park-keeper should desert his Office for five years, it would make a forfeiture without Special Damage.

The other matter returned also, That he is nullo modo peritus in lege, is good Cause; for the Charter appoints them to Elect such an one; so one that is not so qualified is not capable; and the Act of this King authorises Commissioners but to do what the Corporation might have done.

It is apparent, That the Office requires skill in the Law; he hath no power to make a Depury by the Statute of 21 Jac.

Causes in many Cases are not to be removed out of Corporation Courts, where they are held before an Utter Barrister; so that 'tis far better for the Corporation to have such an one their Recorder.

Twisden said, The case of Bernardiston differed, (besides that he apprehended he had much of the favour of the times in it;) for he that was tried before him for having two Wives, was arraigned before him, not as Recorder of Colchester, but as a Commissioner of the Gaol delivery; neither was it returned, That he was Summoned, (which was said not to be material, because they could not have examined the matter.) It was returned also, That he absented himself for nine Months; but not set forth that

any Court was held during that time, or any occasion for it.

He said, That Cholmley Recorder of Lincoln was turned out of his place, for trying the Accessory before the Principal; and altho' there be no Special Fact returned here, yet it may be tried in an Action upon the Case.

The Court said, They would look upon Bernardistons Case. Et Adjournatur.

Anonymus.

A Prohibition shall not go to the Admiralty to stay a Suit there for Mariners Wages, tho' the Contract were upon the Land.

For, First, It is more convenient for them to sue there, because they may all joyn,

Again, according to their Law, if the Ship perish by the Mariners default, they are to lose their Wages; therefore in this special Case the Suit shall be suffered to proceed there.

Dier versus East.

Where by the Statute of Ed. 6. It is ordained, That striking in the Church-yard shall be Excommunication Ipso facto; this tho' it takes away the necessity of any Sentence of Excommunication, yet he that strikes doth not stand Excommunicated, until he be thereof convicted at Law, and this transmitted to the Ordinary.

Theodore Morris's Case.

He was indicted of Murther in Denbigh, and obtained a Certiorari to remove it into this Court, in order to have it tryed in an adjacent English County.

And it was moved whether by Law it might be.

The Statute of 26 H.8.cap.6. empowers the next English County, to take Indictments of Treasons and Felonies committed in Wales, and to try them; but here the Indictment was taken in a Welsh County. Herbers Case in Latch was cited, who was indicted at Montgomery, and tryed at Salop; and Plowden, Matters del corone avenants a Salop; and Southley and Prices Case, 3 Cro. is, That the Statute doth not extend to a Tryal upon an Appeal. In Chedleys Case a Certiorari was granted, as here, to remove an Indictment found in Anglesey, which was afterwards tryed in the next English County, 3 Cro. 331.

And the Court held, that so it might be here.

Large

Large *versus* Cheshire.

Hill. 22. and 23 Car. 2. Rot. 520. In Covenant the Plaintiff declared upon Articles of Agreement, between him and the Defendant, whereby the Defendant covenanted to pay him such a Sum; the Plaintiff making to him a sufficient Estate in such Lands before the Feast of St. Thomas next ensuing the date of the Deed; and then he saith that licet he the Plaintiff, semper a tempore confectionis scripti paratus fuit ad performand' all the Agreements of his part usque ad diem Exhibitionis bille, the Defendant had not paid the Money.

The Defendant pleaded, quod ipse obtulit solvere the Money aforesaid, apud Derby, si le Plaintiff faceret ei bonum & sufficient Statum de & in Premissis, &c.

The Plaintiff replied, Protestando That the Defendant did not offer the Money; pro placito that he the 21 of Decemb. apud Derby fecit & sigillavit quandam Chartam Feoffamenti, whereby he conveyed the Premises to the Defendant, and that he came to the Premises an hour before Sun-set, the same day paratus ad deliberand' seisinam, &c. & quod Defendens nec aliquis ex parte illius venit ad recipiend', &c. to which the Defendant demurred, and adjudged for him.

It was held, That these words ipso faciente bonum statum, were a Condition precedent to the payment of the Money; therefore the Plaintiff in his Declaration should have averred the performance of it particularly, and not by such general words, that he had done all on his part.

And it differs from the Case, where in Assumpsit the Plaintiff declared, That the Defendant in Consideration the Plaintiff should permit him to enjoy such Land for seven years, that he would pay him pro quolibet anno 10s. and the Action was held well brought within the seven years, for that it was an Executory contract for every of the years, according to the intention of the Parties.

It was resolved also, That the Replication was insufficient; for that the Plaintiff having Election to make what Conveyance he pleased, he ought to have given notice to the Defendant, that he would execute this Charter of Feoffment by Livery, for it might have been by Enrollment. But Hale said, The time when in this Case was not necessary to be in the notice, because the Charter was sealed and delivered upon the extream day limited by the Agreement, so the Defendant knew it must be upon that day; so for the place, because it is a local thing, and must be done upon the Land.

But because he had set forth no notice given to the Defendant, that he would make Livery, the Replication is insufficient; as if a Man be bound to Levy a Fine, he must shew whether he will do it in Court, or by Dedimus; and the Court said, if the Defendant had refused to accept of Livery, the Plaintiff might as well have brought the Action as if he had actually made it.

Sacheverel versus Frogate.

IN Covenant, the Plaintiff declares, That Jacinth Sacheverel was seized in Fee, and demised to the Defendant certain Lands for 21 years, rendering to him, his Executors, Administrators and Assigns 120 l. Annually during the Term: By force of which Lease the Defendant entered, and that J. S. Devised the Reversion to the Plaintiff, and died; and for Non-payment of Rent accrued since his Death he brought the Action, and to this Declaration the Defendant demurred.

And it was argued by Winnington, That the Rent determined by the Death of the Lessor, as where the Lessor reserves the Rent only to himself, 1 E. 4. 18. 27 H. 8. 19. Dier 45. Com. 171. the Heir shall not have it, for reservations are taken strongest against the Lessor; so where the reservation is to the Lessor, his Executors and Assigns, it continues but for his Life, Co. Lit. 47. a.

This true, Here is also added Durante Termino; and in Mallories Case, 5 Co. where the reservation was to the Abbot, or his Successors during the Term, it went to the Successor; but that was because they expounded, or as a Conjunctive, for if Successor had been left out, I suppose it would have been resolved otherwise. Richmond and Butchers Case, 1 Cro. 217. is in point, that the Heir shall not have it. So 2 Rolls 451. And Doderidge gives the Reason, That the Party by his words hath abridged what otherwise the Law would make; and so it is held in Bland and Iamans Case, 3 Cro. 288. where a Man possessed of a Term for a 100 years, did joyn in a Lease with his Wife, solvendo so much Rent during the Term to him and his Wife, and the Survivor of them; that the Executors should not have this Rent.

Hunt contra. In the Reservation of a Rent, there is no need of words of Limitation: If the words are Yielding and Paying Generally, without saying to whom, it is a good Reservation to all those to whom the Reversion shall come; so if two Joynt-tenants reserve a Rent generally it is good to both.

Here are sufficient words to declare the intent that the Rent should continue, and then they shall not be restrained by any affirmative words after; and where Executors, Administrators and Assigns are named, that shall be taken as an Enumeration of some particulars, without any intent to exclude others, as where

a man made one his Executor of all his Copy and moveable Goods; this gave him an Interest; as Executor, in all his Chattels, as well as in those which were named, 3 Cro. 292. Rose and Bartlett's Case, 8 Co. Whitlock's Case. If the Reservation be to such persons to whom the Reversion shall come, this is good to the Heir and all others. If a Lease be made, excepting a Chamber, to the Lessor; this remains excepted after the death of the Lessor, 7 M. 8. 19.

Hale: If this were res integra, it might be a strong Case for the Plaintiff; but the Authorities go the other way. Sed Adjornatur. Vide postea.

Termino Sancti Michaelis, Anno 23 Car. II.

In Banco Regis.

Dorrel *versus* Jay.

The Plaintiff declared, that Communication being between J.S. and the Defendant, of the last Will of John Rowe Esquire, deceased, that the Defendant said of the Plaintiff, He hath forged his Uncle Rowe's Will.

After Verdict for the Plaintiff it was moved by Serjeant Ellis in Arrest of Judgment, that it is not averred that John Rowe was dead at the time of the speaking of the words. Sed non allocatur.

For it is said, there was a discourse of the Will of John Rowe Esquire defuncti, and there defuncti goeth to the description of his person, and expressed that he was then dead, and not only when the Action was brought.

Besides, the words imply it; for if he were not dead, he could not forge his Will. Vid. ante Phillips and Kingston's Case, Pasch. 23 Car.

The Case of St. Katherine's Hospital.

The Case, as it appeared upon the Evidence at a Trial at Bar in Ejectment, for part of the Lands of the Hospital, between the Lessee of Sir Robert Atkins the Queens Solicitor, and George Mountague Esquire, was this.

Eleanor, Queen Dowager of Henry the Third, in the year 1273: founded (or at least amply Endowed) this Hospital, reserving to her self, during her Life, & Reginis Angliæ nobis succedentibus, the

the Nomination of the Master to this Hospital; which was Incorporated, and her Grants to it confirmed by the King's Letters Patents.

In the Year 1660, Henrietta Maria, Queen Mother, granted the Mastership of this Hospital to H. Mountague for Life; and the King in the same year reciting, his Mothers Grant, and that the Right of it belonged unto her, Confirmed it by his Letters Patents; and did further by the same Letters Patents grant unto the said H.M. the said Mastership.

Afterwards the King married Katherine the now Queen Consort, and he granted the Mastership to Sir Robert Arkyns for his Life.

It was urged on the part of the Plaintiff, that the Right of appointing the Master was only in the Queen Consort; for Queen Elianor reserved it to her self and her Successors, Queens of England; and Queen of England is not Queen Dowager; but Queen Consort. And tho' Land cannot be limited to descend in such manner without Act of Parliament, as is Resolved in the Prince's Case in 8 Co. yet such a Desultory Inheritance (as this was called) may be created of a thing de novo: As a Rent may be granted and appointed to cease during the Minority of the Heir; or upon the first foundation of a Church, the Patronage may be reserved to A. and if he Presents not within four Months, then to B. So in the Book of E. 3. it was limited, that the Chapter should present while the Deanry was vacant. And to prove, that this Clause had been construed only to intend the Queen Consort, a Record was shewn of a Case between Luttrell and Basse, in 4 E. 3. Where

Luttrell exhibited a Petition to the King, which was Intituled, To our Lord the King and his Counsel. Which Petition was sent into the Kings Bench under the Great Seal, in which Luttrell sets forth, That Queen Isabel, Mother to Edward the Third, had granted him the Mastership of the Hospital for his Life, and that he was disturbed by Basse; and Process was issued out against Basse, who appeared and pleaded a Grant from Queen Philip, Wife to Edward the Third; and a Writ came from the King, reciting, That the Nomination of the Master did belong to Queen Isabel. And so three Writs more came after to the same purpose, and expressing that the Matter was delayed ad inestimabile damnum Consortis nostre: And in that Record, Isabel (tho' living) is styled nuper Regina, and Luttrell that claimed under her was barred.

On the other side, Divers Grants were produced during the time that there were no Queens, by the King, and sometimes by a Queen Dowager, during the time that there was a Queen Consort. And these Points following were agreed by all the Court:

First,

First, That an Inheritance might be limited in this manner in a thing de novo.

Secondly, That this Reservation bring to Queen Elianor, and her Successors, Queens of England, did not exclude Queen Dowagers, and extend only to Queen Consorts. For,

1. A Dowager Queen is Queen of England, and (as Hale said) hath the Prerogative to Sue in the Exchequer.

2. When once she is so qualified as to have the Estate vest in her, it shall continue, tho' she doth not remain in the same Capacity.

As where one hath power to Limit an Estate to his Wife, it may very well continue in her after the Coverture.

Thirdly, It was much observed and relied upon, that Queen Elianor was only Dowager at the time of the Foundation, and so could never be intended to exclude such Queens as should succeed her in that Capacity.

Fourthly, During such time that there should be no Queen, it was held, that the King was to constitute the Master; for he is Heir to Queen Eleanor. And whereas it was urged for the Plaintiff, That the King had not power to dispose of the place, but only by way of provision till such time as a Queen should be; so as to commit the Care of the Poor to one, but not the Interest of the Mastership.

It was clearly Resolved, that the King might grant it, and that the Estate of the Grantee should continue, tho' the King's Interest devolved upon the succeeding Queen. And it was Resembled to the Case of the Duchy of Cornwall: If the King, while there is no Prince of Wales, makes a Lease of Lands belonging to that Duchy, this shall determine upon the Birth of that Prince; but if he Presents to a Church, the Incumbent shall not be removed; as in case where the King presents to a Church by reason of the Temporalities of a Bishoprick, the Bishop after Created shall not remove the Clerk.

And the Chief Justice said in this case, that the Interest of the Mastership did not properly pass from the King, so as it should have a dependance upon the King's Estate; for the King doth but Dominate, and the Master is Intituled as from the first Foundation and Constitution.

It was further agreed, that a thing of this nature could not be granted in Reversion; for 'tis not like an Office, but rather as a Prebendary or Incumbency of a Church; and the Master, as Head of the Corporation, with his Brethren, hath the whole Estate in him.

As to the Record in 4 Ed. 3. it was said, and so shewn out of Speeds Chronicles, produced in Court, That at that time Queen Isabel was under great Calamity and Oppression, and what was then determined against her was not so much from the Right of the

Note, For Evidence.

the thing, as the Iniquity of the Times; neither hath it been heard, that one who had been Queen of England, should be called *nuper Regina* in her Life time: So that that Authority was much invalidated from the Circumstance of the Time.

The Plaintiffs observing the Court thus clearly for the Defendants Title, was *Non suit*.

Note, It was not Resolved, whether if there had been a Queen Consort at the time of this Grant, it had been good to the Defendant? But the Judges rather inclined that it should.

Davison versus Hoslip.

In an Assumpsit the Plaintiff sets forth, That J. S. owed him 20 l. for the Arrear of an Annuity, and that the Defendant was Receiver of the Rents of J. S. and appointed by J. S. to pay the Plaintiff his 20 l.

That the Defendant, in Consideration that the Plaintiff would forbear him ad tunc Receiver & serv' J. S. to such a time, that then he would pay him, if he lived and continued Receiver.

To this the Defendant pleaded non Assumpsit, and a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that it did not appear that the Defendant had at the time of the Promise any of the Rents of J. S. in his hands; and then the forbearing of him could be no Consideration, because not liable to any Suit. And tho' in case of an Executor's Promise there need be no Averment of Assets; for notwithstanding that he may be Sued, and the Plaintiff may have Judgment to recover when Assets shall come, yet 'tis not so in this Case. Sed non allocatur.

For it being shewn, That he was Receiver at the time of the Promise, and averred, That he so continued; 'tis a strong Intendment that he had Effects in his hands, especially after a Verdict.

It was also said, That the taking of this Promise did not discharge the Principal Debtor; but that there might be resort to him so long as the Money was unpaid.

Brown versus London.

In an Action upon the Case, the Plaintiff declared upon the Custom of Merchants, that J. S. drew a Bill of Exchange upon the Defendant, to pay to the Plaintiff; which he accepted, and hath not paid him.

And declared further sur Indebitar' upon such a Sum; for that the Defendant accepted a Bill of Exchange from him, &c.

Upon

Upon non Assumpsit a Verdict was found for the Plaintiff, and entire Damages given.

And it was moved in Arrest of Judgment, that an Assumpsit *sue Indebitatus* did not lye upon this matter, but only an Action upon the Case, as it was laid in the first part of the Declaration, where the Custom of Merchants is set forth, and that the Defendant by reason thereof is chargeable; and this is not to be involved in a general *Indebitatus assumpsit*.

And of that Opinion were Hale and Rainsford, who said it had been so Adjudged in the Exchequer since the King's Return.

But they said, If A. delivers Money to B. to pay to C. and gives C. a Bill of Exchange drawn upon B. and B. accepts the Bill, and doth not pay it, C. may bring an *Indebitatus assumpsit* against B. as having received Money to his use: But then he must not declare only upon a Bill of Exchange accepted, as the Case at Bar is.

So by their Opinions the Judgment was stayed, *hæsitante Twisden*; for he conceived that the Custom made it a Debt for him that accepted the Bill.

Hle's Case.

A Mandamus was prayed to restore a Sexton. The Court at first doubted whether they should grant it; because he was rather a Servant to the Parish, than an Officer, or one that had a Freehold in his Place. But upon a Certificate shewn from the Minister, and divers of the Parish, That the Custom was there to choose a Sexton, and that he held it for his Life; and that he had 2 d. a Year of every House within the Parish; They granted a Mandamus, and it was directed to the Churchwardens.

Twisden said, that it was Ruled in 1652. in this Court, That a Mandamus did not lye to be restored to a Stewardship of a Court Baron, but of a Court Leet it did; for there the Steward is Judge, but of a Court Baron the Suitors are Judges.

But Hale said, He was of another Opinion; for the Steward is Judge of that part of the Court which concerns the Copyholds; and is Register of the other. Ante.

Oble *versus* Dittlesfield.

In an Assumpsit the Plaintiff sets forth, That J. S. was Indebted to him in 40 l. and that the Defendant was Indebted in the like Sum to J. S. and that J. S. did appoint him to receive this 40 l. from the Defendant in satisfaction for the Debt due to him from J. S. Which he signifying to the Defendant, he in considera-

tione præmissorum, and that the Plaintiff would forbear him a Quarter of a year, promised that he would then pay him.

To this the Defendant pleaded non Assumpsit, and a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that here was no sufficient Consideration; for it doth not appear that the Defendant was party to this Agreement, whereby he should become chargeable by the Plaintiff, and then the forbearance is not material, and in the mean time he is Suable by J. S. his Creditor. And Clipsham and Morris's Case was cited, which was Adjudged in this Court Hill. 20 & 21 Car. 2. where the Plaintiff in an Assumpsit declared, that J. S. was Indebted to him in 50 l. and gave him a Note, directed to the Defendant, whereby he required the Defendant to pay him; who upon view of the Note, in Consideration that the Plaintiff would accept of his Promise, and forbear him a fortnight, promised to pay him the Money. There (after Verdict for the Plaintiff) Judgment was Arrested, because that was held no Consideration. Sed non allocatur.

For Hale said, When Assumpsits grew first into practice, they used to set out the Matter at large (viz.) in such a Case as this, Quod mutuo aggregatum fuit inter eos, &c. and they should be discharged one against the other; but since it hath been the way to declare more concisely. And upon the whole Matter here it appears, that the Defendant agreed to this Transferring of the Debt of J. S. to the Plaintiff; and that it was agreed, that he should be discharged against J. S. And he said, that the Case of Davison and Haslip (hoc Termino ante) was to the same effect: And for Clipsham's Case, that was said to be good Law; for there it did not appear that the Defendant was at all Indebted to him that sent the Note.

Sir William Hicks's Case.

DEbt was brought against him by the Name of Sir William Hicks, Knight and Baronet.

He pleaded in Abatement, that he was never Knighted.

The Plaintiff moved, that he might Amend, and that he had put in Bail by the Name of Knight and Baronet, so that he was concluded to alledge this Matter; which the Court agreed if it were so: But it was found to be Entred for William Hicks, Baronet only. So they said, they could not permit any Amendment; but the Plaintiff must of necessity Arrest him over again.

Fisher versus Batten.

A Bill was Exhibited in the Dutchy Court, to be relleved against the Forfeiture of a Mortgage of Lands lying within the County of Lancaster.

The Defendant prayed a Prohibition; Surmizing, that the Lands in question were not the Kings Lands, or holden of him, and therefore he ought not to Answer in the Dutchy Court. And the Court appointed to hear Counsel on both Sides, whether or no this Prohibition were to be granted.

And it was Argued by Sir William Jones for the Prohibition; That a Court of Equity must begin by Prescription or Act of Parliament.

That there can be no Prescription in this Case; for both the Dutchy and County Palatine of Lancaster began within time of Memory. Henry, father of John of Gaunt, was the first Duke of Lancaster, and he was made so in Edward the Third's time, and then Lancaster was made a County Palatine.

The Act of Parliament upon which this Case must depend, is that of 1 Ed. 4. which takes notice, that the Dutchy and County Palatine of Lancaster were forfeited to the Crown by the Attainder of H. 6. and Enacts, That they shall be separate and distinguished from other Inheritances of the Crown; and appoints a Chancellor for the County Palatine, and a Chancellor for the Dutchy, and that each should have his Seal; so that the Chancellor of the Dutchy is not to intermeddle in the County Palatine, which hath a Chancellor of its own for Matters there.

Counties Palatine had their Original from a Politick Reason; and Lancaster, Durham and Chester were made so probably, because they were adjacent to Enemies Countries; (viz.) the two first to Scotland, and Chester to Wales; so that the Inhabitants having Administration of Justice at home, and not being obliged to attend other Courts, those parts should not be disfurnished of Inhabitants, that might secure the Country from Incursions.

'Tis true, of a long time the Chancellorship both of County and Dutchy have been in one Person; but 'tis the same thing as if there were two, for the several Capacities remain distinct in him.

The first Patent that made it a County Palatine, Ordained that it should have *Jura regalia ad Comitatum Palatinum pertinent* Com. 215. adeo libere & integre sicut Comes *Cestrie*, infra eundem *Comitat' Cestrie* dignoscitur obtinere, &c. So that by that the Jurisdiction ought to be exercised within the County.

They have shewn indeed a multitude of Presidents, but I can hear but of One, for the first Fifty years after 1 Edw. 4. most of the other are of Personal things; and of the rest, divers began in the County Palatine, and were transmitted to the Duchy Court: As they may send Causes out of the Courts there, to be Argued in the Kings Bench; but doubtful whether the Court here can give Judgment.

They have very few Presidents of Causes which commenced Originally in the Duchy Court, which is but a Court of Revenue, 4 Inst. The Court of Requests had a multitude of Presidents, but could not thereby gain it self any Jurisdiction, 4 Inst. 97. *Holk's Case* Hob. 77. A Bill was Exhibited to be relieved against the Penalty of a Bond, which concerned an Extent of Lands within the County Palatine, and a Prohibition was granted; for the Duchy Court is said there to have nothing to do, but with the Kings Land, and his Revenue. Vid. Rolls——accordingly.

Weston contra: We cannot pretend to a Court of Equity by Prescription; but we have Presidents of above Two hundred years last past, as well of Bills retained, which commenced Originally here, as of those transmitted; and that of Transmission is agreed on the other side, which proves the Jurisdiction. For if a Certiorari, or Corpus cum causa, should go out of the Kings Bench, Conusans of Pleas might be demanded, and so to stop the Removing of the Cause out of the Inferiour Court.

We maintain our Jurisdiction upon the Statute of 1 Ed. 4. before which the County Palatine and Duchy of Lancaster were distinct, as they were 1 H. 4. by which Act they were both severed from the Possessions of the Crown: But now 1 Ed. 4. makes one Body of these distinct Bodies, and gives a superiority to the Duchy over the County Palatine; for that is annexed unto, and made parcel of the Duchy, as the supreme Name of Corporation.

The Words of the Act are: That our Liege and Sovereign Lord, King Edward the Fourth, and his Heirs, have as parcel of the Duchy the County of Lancaster, and County Palatine; and there is a Chancellor and Seal appointed for the County Palatine, and a Seal also for the Duchy, and a Chancellor there for the keeping thereof; and Officers and Counsellors for the Guidance and Governance of the same Duchy, and of the particular Officers, Ministers, Tenants, and Inhabitants thereof.

So that the Act having Constituted a Chancellor indefinitely over the Duchy, and not circumscribing his Power, it is not reason to exempt any part of the Duchy, and that the County is by force of this Act. In the 4 Inst. 119. it is said, that seeing there hath been time out of mind a Chancellor of the Exchequer, that there should be also in the Exchequer a Court of Equity. So the Book of the 2d of H. 8. and Rolls Tir. Prohibition to the Chancery, that

that where there is a Chancellor time out of mind, a Court of Equity follows of consequence, 4 Inst. 212. It is said, that the Chamberlain of Chester hath the Jurisdiction of a Chancellor within the County Palatine of Chester; as the Chancellor of the Duchy of Lancaster hath lawfully used and executed within the County Palatine of Lancaster.

Hale Chief Justice. The County Palatine of Lancaster is by Act of Parliament, and therefore Outlawry there is a good Plea in disability; but an Outlawry in Chester is not pleadable here, for that is a County Palatine by Prescription.

The Possessions of the Duke of Lancaster were not made a Ducatus, until 2 H. 5. in the Parliament Roll, for that year 'tis entered Quod sigilla pro Ducatu Lancastrie allocentur, and that it should be governed per Ministros Ducatus.

By the Parliament Roll, 39 H. 6. amongst the Tower Records it appears; that there was appointed a Chancellor of the Duchy, an Attorney, Auditor, a Steward, and a General Receiver; also a Chancellor and the like Officers for the County Palatine.

So that before the Statute of 1 Ed. 4. there was a Chancellor of the Duchy.

I do not think the bare granting of a Chancellor, will incidently give a Court of Equity, nor is such a Court incident to a County Palatine, tho' there is a general grant of Jura regalia; but the main matter is upon the Statute of the 1 Ed. 4. which Enacts, That the County of Lancaster be a County Palatine, (which perhaps would have otherwise determined by the Attainder) and that it be parcel of the Duchy, and that there be Officers and Councillors for the guiding of the same Duchy, and of the particular Officers, Ministers and Tenants, and Inhabitants thereof, in as great, ample and large Form, as Henry calling himself King Henry the 5, at any time herein had used and enjoyed lawfully; and further, That in the same Duchy be used, had and occupied all such Freedoms, Liberties, Franchises, Priviledges, Customs and Jurisdictions as were used therein lawfully. These words would not of themselves give a Court of Equity, but are relative to what was formerly; and the Presidents that have been produced, are an Evidence that there was such a Jurisdiction exercised before this Act, which is confirmed and established by it.

We have no full account of its original, but there are such Prints and Footsteps of it, that we must presume it lawful; or otherwise, 'tis not to be thought that the Act should refer to it, Hols Case agrees, that they have a Court of Equity, and so as 'tis reported in Rolls, tho' there is a mistake in the Report, where 'tis said, that the Duchy have no Jurisdiction of such Lands as lye out of the County Palatine, tho' holden of the King; but possibly they may extend their Jurisdiction too far, when they retain

Bills

Bills concerning Lands lying out of the County Palatine, within the precinct of the Dutchy, but not holden. But that matter is not now in question.

I think no Prohibition ought to go in this Case.

First, Because the Statute of the 1 Ed. 4. makes the County Palatine parcel of the Dutchy.

Secondly, For that the Statute refers to the Jurisdiction formerly exercised, and appoints the Tenants and Inhabitants of the Dutchy to be under the same Regulation. And for that, there are such multitude of Presidents of Proceedings in this nature, (and allowing transmission of Causes yields them a Jurisdiction) for the space of 200 years, and so many Mens Estates depend upon their Decrees, which have been made with the assistance of so many Learned Judges, which at all times have been called to assist in this Court, that it would be very unreasonable and inconvenient to unsettle them.

Upon a Quo Warranto, the matter might be more strictly examined, than it is fit to do upon a Prohibition.

And Twisden and Rainsford concurred, That no Prohibition ought to go.

It was then objected, That this Bill was not well exhibited, for it was directed Cancellario only; whereas the Court is holden coram Cancellario & Concilio.

Hale said, That would not be material, for in Ed. 1. time the Stile of the Kings Bench was coram Rege & Concilio, and the Writ de Ideota examinando, commands the Ideot to be brought coram nobis & Concilio nostro apud Westmon', and anciently Bills were so directed in Chancery, but since have been altered.

Maddys Case.

John Maddy was indicted, for that he ex malicia sua præcogitat' felonice murdravit Franc' Mavers, upon which he was arraigned at the Assizes in Southwark, and pleaded Not guilty; and the Jury found a Special Verdict, by the direction of Justice Twisden then Judge of Assize there, which was to this effect.

That Maddy coming into his House, found Mavers in the act of Adultery with his the said Maddys Wife, and he immediately took up a Stool and struck Mavers on the Head, so that he instantly died.

They found that Maddy had no precedent malice towards him, and so left it to the Judgment of the Court, whether this were Murder or Manslaughter.

The Record was this Term removed into the Kings Bench by Certiorari, and Maddy brought by Habeas Corpus. And the Court were all of Opinion that it was but Manslaughter, the provocation being exceeding great, and found that there was no precedent

cedent *Malice*; and it was taken to be a much stronger Case than *Royley's Case*, 2 Cro. 296. Where the Son of Royley coming home with a Bloody Nose, and telling his Father that such an one beat him in such a Field, to which Field (which was a mile off) the Father immediately run, and found him that had beat his Son there, and killed him, all which was found upon a Special Verdict; and resolved to be but Manslaughter.

But Twisden said there was a Case found before Justice Jones, which was the same with this, only it was found, that the Prisoner being informed of the Adulterers familiarity with his Wife, said he would be revenged of him, and after finding him in the Act, killed him, which was held by Jones to be Murder. Which the Court said might be so, by reason of the former declaration of his intent; but no such thing is found in the present Case.

Barber versus Fox.

TRein. 22 Car. 2. Rot. 855. In an Assumpsit the Plaintiff declared, That the Ancestor of the Defendant became bounden to him in a certain Sum, and afterwards died, and that he demanded it of the Defendant being his Heir; and the Defendant in consideration, that the Plaintiff would forbear to Sue him for such a time, promised he would pay him.

To this the Defendant pleaded Non Assumpsit, and a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, for that at the time of the Promise there doth not appear, that there was any cause of Suit against the Heir; for 'tis not set forth, that the Ancestor did bind his Heirs, and the Consideration is not here to forbear to Sue generally, but to stay a Suit against the Defendant, whom he could not Sue.

To which it was answered, That after a Verdict it shall be intended, there was cause of Suit, as Hob. 216. *Bidwell and Cattons Case*. An Attorney brought an Assumpsit upon a Promise made to him, in Consideration that he would stay the Prosecution of an Attachment of Privilege; and there held that it need not appear, that there was cause of Suit, for the Promise argues it, and it will be presumed. And here 'tis a strong intendment, that the Bond was made in Common Form, which binds the Heirs.

But Judgment was given against the Plaintiff; for the Court said it might be intended, that there was cause of Action, if the contrary did not appear, which it doth in this Case, for the Bond cannot be intended otherwise than the Plaintiff himself hath expressed it, which shews only, that the Ancestor was bound. And whereas it was said by the Plaintiff's Counsel, that this would attain the Jury, they finding Assumpsit upon a void Promise.

Hale

Hale said there was no colour for that conceit, The Plaintiff having proved his Promise, and Consideration as 'twas laid in the Declaration, which is the only thing within their charge upon Non Assumpsit, modo & forma.

Bulmer versus Charles Pawlet, Lord Saint John.

In an Ejectment upon a Tryal at Bar this question arose upon the Evidence.

Tenant for Life Remainder in Tail to J. S. joyn in a Fine, J. S. dies without Issue, whether the Conusee should hold the Land for the Life of the Tenant for Life.

Serjeant Ellis pressed to have it found Specialy, tho' it is resolved in Bredons Case, that the Estate of the Conusee shall have Continuance; but he said it was a strange Estate, that should be both a Determinable Fee, and an Estate pur autre vie; and he cited 3 Cro. 285. Major and Talbotts Case, where in Covenant the Plaintiff sets forth, that a Feme Tenant for Life, Remainder in Fee to her Husband, made a Lease to the Defendant for years, wherein the Defendant covenanted with the Lessors, their Heirs and Assigns to repair; and they conveyed the Reversion to the Plaintiff, and for default of Reparations, the Plaintiff brought his Action as Assignee to the Husband: And resolved to be well brought, because the Wives Estate passed as drowned in the Fee.

The Court said, Bredons Case was full in the point; but the Reason there given, Hale said, made against the Resolution; for 'tis said, that the Remainder in Tail passes first, which if it does the Freehold must go by way of Surrender and so drowned; but they shall rather be construed to pass insimul & uno statu, Hob. 277 In Englishes Case, it was resolved, if Tenant for Life Remainder in Tail to an Infant joyn in a Fine, if the Infant after Reverse the Fine, yet the Conusee shall hold it for the Life, of the Conusor, 1 Co. in Bredons Case, and he resembled it to the Case, in 1 Inst. a Man seized in the right of his Wife, and entituled to be Tenant by the curtesie joyns in a Feoffment with his Wife, the Heir of his Wife shall not avoid this during the Husbands Life.

Nevertheless he told Ellis, That he would never deny a Special Verdict at the request of a Learned Man; but it appearing, that the Plaintiff had a good Title after the Life should fall, the Defendant bought it of him, and the Jury were discharged.

Sacheverel *versus* Frogate.

PAS. 23 Car. 2. Rot. 590. In Covenant, the Plaintiff declared, That Jacinth Sacheverel seized in Fee, demised to the Defendant certain Land for years, reserving 120 l. Rent. And therein was a Covenant; that the Defendant should yearly, and every year, during the said Term, pay unto the Lessor, his Executors, Administrators and Assigns the said Rent; and sets forth, how that the Lessor devised the Reversion to the Plaintiff, and for 120 l. Rent since his decease he brought the Action.

The Defendant demanded Oyer of the Indenture, wherein the Reservation of the Rent was yearly during the Term to the Lessor, his Executors, Administrators and Assigns, and after a Covenant prout the Plaintiff declared, and to this the Defendant demurred.

It was twice argued at the Bar, and was now set down for the Resolution of the Court, which Hale delivered with the Reasons.

He said they were all of Opinion for the Plaintiff. For what interest a Man hath, he hath it in a double capacity, either as a Chattel, and so transmissible to the Executors and Administrators, or as an Inheritance, and so in capacity of transmitting it to his Heir.

Then if Tenant in Fee makes a Lease, and reserves the Rent to him and his Executors, the Rent cannot go to them, for there is no Testamentary Estate. On the other side, if Lessee for a 100 years should make a Lease for 40 years, reserving Rent to him and his Heirs, that would be void to the Heir.

Now a Reservation is but a Return of somewhat back in Retribution of what passes; and therefore must be carried over to the Party which should have succeeded in the Estate if no Lease had been made, and that has been always held, where the Reservation is general.

So, tho' it doth not properly create a Fee, yet 'tis a descendible Estate; because it comes in lieu of what would have descended; therefore Constructions of Reservations have been ever according to the Reason and Equity of the thing.

If two Joynt-tenants make a Lease, and reserve the Rent to one of them, this is good to both, unless the Lease be by Indenture; because of the Estoppel, which is not in our Case, for the Executors are Strangers to the Deed.

'Tis true, if A. and B. join in a Lease of Land, wherein A. hath nothing, reserving the Rent to A. by Indenture, this is good by Estoppel to A. But in the Earl of Clare's Case it was resolved, That where he and his Wife made a Lease reserving a Rent to

himself and his Wife and his Heirs, that he might bying Debt for the Rent; and declare as of a Lease made by himself alone, and the Reservation to himself; for being in the Case of a Feme Covert, there could be no Estoppel, altho' he signed and sealed the Lease.

There was an Indenture of Demise from two Joynt tenants reserving 20 l. Rent to them both; one only sealed and delivered the Deed, and he brought Debt for the Rent, and declared of a Demise of the Moiety, and a Reservation of 10 l. Rent to him. And resolved that he might. Between Bond and Cartwright (which see before) and in the Common Pleas, Pas. 40 Eliz. Tenant in Tail made a Lease reserving a Rent to him and his Heirs. It was resolved a good Lease to bind the Entail, for the Rent shall go to the Heir in Tail along with the Reversion, tho' the Reservation were to the Heirs generally. For the Law uses all industry imaginable, to conform the Reservation to the Estate. Whitlocks Case, 8 Co. is very full to this, where Tenant for Life, the Remainder over so settled by Limitation of uses, with power to the Tenant for Life to make Leases, who made a Lease reserving Rent to him, his Heirs and Assigns.

Resolved, That he in the Remainder might have the Rent upon this Reservation.

So put the Case, That Lessee for a 100 years should let for 50, reserving a Rent to him and his Heirs during the Term; I conceive this would go to the Executor. 'Tis true, if the Lessor reserves the Rent to himself; 'tis held, it will neither go to the Heir or Executor: But in 27 H. 8. 19. where the Reservation is to him and his Assigns, It is said, that it will go to the Heir. And in the Case at Bar the words Executors and Administrators are void; then 'tis as much as if reserved to him and his Assigns during the Term, which are express words declaring the intent, and must govern any implied construction, which is the true and particular Reason in this Case.

6 Co. 62.

The Old Books that have been cited have not the words during the Term. Vid. Lane 256. Richmond and Butchers Case indeed is judged contrary in point, 3 Cro. 217. but that went upon a mistaken ground, which was the Manuscript Report 12 E. 2. Where, as I suppose the Book intended was, 12 E. 3. Fitz. Assize, 86. for I have appointed the Manuscript of E. 2. (which is in Lincolns Inn Library) to be searched, and there is no such Case in that year of E. 2. The Case in the 12 E. 3. is, A Man seized of two Acres, let one, reserving Rent to him, and let the other, reserving Rent to him and his Heirs; and resolved, that the first Reservation should determine with his Life, for the Antithesis in the Reservation makes a strong Implication that he intended so. In Wotton and Edwins Case, 5 Jac. the words of Reservation were Yeilding and Paying to the Lessor,

Lessor, and his Assigns. And resolved, that the Rent determined upon his Death. In that case there wanted the effectual and operative Clause during the Term.

The Case of *Sury and Brown* is the same with ours in the words of Reservation; and the Assignee of the Reversion brought Debe, and did not abate the Life of the Lessor. And the Opinion of Jones, Croke and Doderidge was for the Plaintiff; *Larches Rep.* 99. Lane 255.

The Law will not suffer any Construction to take away the energy of these Words, during the Term.

If a Man reserves a Rent to him or his Heirs, 'tis void to the Heir, 1 Inst. 214. a. But in *Mallorys Case*, 5 Co. where an Abbot reserved a Rent during the Term to him or his Successors, it was resolved good to the Successor.

It is said in *Brudnells Case*, 5 Co. that if a Lease be made for years, if A. and B. so long live, if one of them dies the Lease determines, because not said, if either of them so long lives. So it is in point of Grant. But it is not so in point of Reservation, for *Pal. 4 Jac.* in the Common Pleas between *Hill and Hill*, The Case was, a Copyholder in Fee, (where the Custom was for a Widows Estate) made a Lease by Licence, reserving Rent to him and his Wife during their lives, (and did not say, or either of them,) and to his Heirs: It was resolved,

First, That the Wife might have this Rent, tho' not party to the Lease.

Secondly, That tho' the Rent were reserved during their lives, yet it should continue for the life of either of them; for the Reversion, if possible, will attract the Rent to it, as it were by a kind of Magnetism.

Hoskins versus Robbins.

A Replevin for six Sheep. The Defendant makes Conusance, &c. for Damage Feasant: The Plaintiff replied, That the place where, was a great Wast, parcel of such a Mannor, within which there were time out of mind Copyhold Tenants, and that there was a Custom in the Mannor, that the said Tenants should have the sole and several Pasture of the Wast, as belonging to their Tenements, and shews, that the Tenants licenced him to put in his Beasts.

The Defendant Traverses the Custom, and found for the Plaintiff. The exceptions moved in Arrest of Judgment, were now spoken to again.

First, That the Custom to have the sole Pasture, and thereby to exclude the Lord, is not allowable. It hath been ever held, That such a Prescription for Common is not good, and why should the same thing in effect be gained by the change of the name?

That Prescription for Pasture, and Prescription for Common is the same thing. Vid. 3 Cro. Daniel v. Count de Hertford 542. and Rolls tit. Prescription 267. It is held, a Man may claim Common for half a year, excluding the Lord; and that one cannot prescribe to have it always so, is not because of the Contradiction of the Term; for if the sole feeding be but for half a year, 'tis as improper to call it Common; but the true reason seems to be, because it should in a manner take away the whole profit of the Soil from the Lord, and he should by such usage lose his greatest Evidence to prove his Title; for it would appear that the Land was always fed by the Beasts of others; and it would be very mischievous to Lords, who live remote from their Wasts, or that seldom put their Beasts there, (as many times they do not) so that by the Tenants solely using to feed it, they should lose their Improvements provided for the Lords by the Statute, and so come at last for want of Evidence to lose the Soil it self.

Secondly, This Custom is laid, To have the sole Feeding belonging to their Tenements, and 'tis not laid for Beasts levant and couchant, or averred that the Beasts taken were so, 15 E. 4. 32. and Rolls tit. Common 398. Fitz. tit. Prescription 51. A Man cannot prescribe to take Estovers as belonging to his House, unless he Avers them to be spent in his House, Noy 145. So 2 Cro. 256. tho' the Prescription was there to take omnes Spinæ, for it is necessary to apply it to something which agrees in nature to the thing, Brownlow. 35.

Thirdly, Here the Plaintiff justifies the putting in his Beasts by a Licence, and doth not say it was by Deed, whereas it could not be without Deed; and so is the 2 Cro. 575.

Fourthly, Those defects are not aided by the Verdict, for they are in the right and of substance. But the Court were all of Opinion for the Plaintiff.

First, They held the Prescription to be good, (and being laid as a Custom in the Mannor, it was not needful to express the Copyhold Estates) it doth not take away all the profit of the Land from the Lord; for his interest in the Trees, Mines, Bushes, &c. continues. Co. Inst. 122. a. is express, that a Prescription may be for sola & separalis pastura; and if it may be for half a year, upon the same reason it may be for ever. An interest of this nature might have commenced by grant, 18 E. 3. the Lord granted to the Tenant that he would not improve; tho' it may be such a Grant were not good at this day.

The Court were agreed in this point, in the Case between Porter and North, brought here about three years since; the principal doubt in that Case was, whether the Freeholders and Copyholders could in pleading alledge a Joint Prescription for the Sole Pasture; and for the mischief alledged, that this might be obtained from every Lord, that had not of a great many years used his Common,

Hale

Hale said, It would not be sufficient to prove an Usage for the sole Pasture, to shew that the Tenants had only fed it; unless it were proved also, that the Lord had been opposed in putting in his Cattle, and the Cattle Impounded from time to time.

To the Second Objection: They held that Levancy was not material in this case, because the sole Feeding is claimed. So where Common for a certain number of Beasts is claimed, 'tis possible between the Tenants there may be some proportioning of it, that one may not eat up all from the rest; but 'tis not material to the Owner of the Soyl. And Twisden said, it was Resolved in this Court, between Stonell and Masselden, that want of averment of Levancy and Couchancy was aided by a Verdict.

Thirdly, Tho' the Licence is not shewn to be by Deed, they Resolved it was well enough. 'Tis true, if the Licence were to make Title against the party which gave it, there would be greater question: For 'tis nothing to the Plaintiff, who it appears had no Damage; at the most, it is but a Mispleading aided by 32 H. 8. And the Plaintiff waived this matter, and took Issue upon the Custom, which is the material Point, and it is found against him. There might have been more colour upon a Demurrer. Ante. Vid. 2 Cro. 377.

Anonymus.

A Prohibition was granted to a Suit for Fees in the Ecclesiastical Court by an Apparitor, upon a Suggestion that there were no such Fees due by Custom.

For that is tryable at Law, and not by a Decinaria or Vicinaria præscriptio, which is allowed in their Courts: But they may sue there for their due and customary Fees.

Brell versus Richards.

Error upon a Judgment in the Common Pleas, in an Ejectment against Eight Defendants, and the Writ was, Ad grave dampnum ipsorum; the Judgment was only against Three, and the other Five were acquitted. The Error was assigned in the Nonage of the Three.

It was moved, Whether the Writ of Error was well brought; or whether the Judgment should be reversed in toto?

The Court Resolved, that the Writ was good, tho' it might be also ad damnum only of those Convicted: But being only in the nature of a Commission, whereby the King commands the Errors to be examined, this matter is not material. Hob. 70.
Yelv. 209.

And

And Twisden said, that the constant Practice is, for all to joyn: And they all held, That the Judgment ought to be Reversed against all.

Sir Anthony Bateman's Case.

UPON a Trial at Bar, the Question was, Whether he were a Bankrupt, or no?

It was proved that he was a Turkey Merchant, and Traded in the Year 1656; but it was not proved, that he had afterwards Imported or Exported any thing, but having the Effects of his former Trade by him to a great Value, he shewed them to several, and obtained the Loan of divers Sums of Money upon the Credit of them.

The Court held, that this brought him within the Statute, for such Debts as he Contracted after 1656, otherwise the mischief would be great; for Men cannot take notice when another withdraws his Trade, or when he Commands his Factors beyond Sea to Deal no further for him; but they seeing great quantities of Goods and Merchandize in his hands are apt to Trust him: Wherefore 'tis fit that they should be Relieved by the Statute.

Anonymous.

AN Administrator brought a Writ of Error upon a Judgment given in an Ejectment against the Intestate.

It was held, that he should pay no Costs, tho' the Judgment were affirmed, and the Writ brought in dilacione Executionis.

The Bishop of Exeter *versus* Starr.

IN Debt upon a Bond, the Condition recited, That whereas the Obligor was Excommunicated for not coming to Church, and that the now Plaintiff at his Instance and Request had absolved him: That if he should obey all the lawful Commands of the Church, that then, &c.

The Defendant Demurred, supposing the Condition to be against Law, and so the Bond void.

Hale said, If a man were Excommunicated, there was a Writ De cautione admittenda; and sometimes they took an Oath of the party, Ad parendum omnibus Ecclesie mandatis licitis & honestis, and that was called Cautio juratoris; and sometimes Cautio pignoratitia was given.

He said also, It was held 8 Car. in Com. Banco, that where the Ecclesiastical Court took a Bond of an Administrator, to make distribution of what remained of the Intestates Estate after Debts and Legacies satisfied, or to dispose so much to Pious uses, that the

the Bond was void; so they presumed the party in such cases to be under a kind of Coercion. Et Adjornatur.

Isaac versus Ledgingham.

In a Replevin, the Defendant showed for Suit of Court. The Plaintiff Replies, and confesseth himself Tenant of the Mannor; and saith, That there are very many Tenants of the Mannor, and that there is a Custom, That if those Copy-holders which live remote from the Mannor, pay Eight pence to the Steward of the Court for the Lord, and 1 d. to himself for the Entering of it, that they should be excused of doing their Suit for One year after the said payment; and alledgeth, That he lives 10 Miles from the Mannor, and that he tendered the 8 d. and 1 d. and both were refused.

To this the Avowant Demurred:

First, The Custom is unreasonable; so by means of it no Court can be kept, if so be all the Tenants live remote.

Secondly, The Plaintiff hath not brought himself within the Custom; so that is to be discharged upon payment, and not upon tender and refusal: And the Construction of Customs is always strict to the User, and not with that latitude as is used in Contracts.

Hale: His Custom gives the Suit, and consequently may qualify it: The Doubt arises, because the Plaintiff hath not alledged, that there are any Tenants like near or within the Mannor; or whether that ought to be shewn on the other side, if it be not so; because the Intendment is strong, that there are: Therefore a By-Law in a Mannor binds the Tenants without notice; because they are supposed to be within the Mannor.

For the other matter they all held, that Tender and Refusal, was as much as Payment.

And Twisden said, It was Resolved, where an Award was made that A. should pay B. 10 l. and that B. super receptionem decem librarum should Release: That he was bound to release it, if the Money were offered, tho' he should refuse it, Wherefore they gave Judgment for the Plaintiff.

8 Co. 76.

1 Inst. 203.

1 Rolls 129.

9 Co. 79.

Sir John Coriton and Harvey versus Lithby.

PAsc. 22 Car. 2. Rot. 331. In an Action upon the Case the Plaintiffs declared, that there were four ancient Mills within a Mannor.

And that J. C. was seized in fee of Two of the Mills, and J. H. of the other Two; and said a Prescription in each, That they had kept the Mills in Repair, and sound Grinders, to the intent that

that the Tenants of the Mannor might Grind at them; and that Time out of mind the Tenants had Ground *omne frumentum*, to be spent in their Houses, at the Mills of J. C. or at the Mills of J. H. And so that the Defendant spent Corn which was ground at neither of the Mills, they brought this Action.

To this Declaration the Defendant Demurred:

First, For that they joyn in the Action, and so the one shall recover Damages for not Grinding at the others Mill, which is no loss to him.

Secondly, The Prescription is for Grinding all the Corn to be spent in the Houses of the Tenants, which is unreasonable; for a great deal of Corn is used which is not proper to Grind. So it was said to be Adjudged between Aylett and Charlesworth 1654. in B.R. that the Prescription ought to be laid for all Corn, *trituran-dum & consumendum* in their Houses. And this last Exception was held to be material by all the Court.

But they conceived the Action might be brought by both; for otherwise there could be no remedy upon the Prescription. For singly they could not bring it; because Grinding at any of the Mills would excuse the Defendant.

But Hale said, the Declaration was naught; because it is, That the Defendant ought to Grind at the Mills of J. C. or J. H. which is true, if either of them hath an ancient Mill, altho' the other hath no pretence of right upon the Prescription: And therefore it ought to have been laid thus; That such Corn, &c. as was not Ground at the Mills of J. C. ought to be Ground at the Mills of J. H. and then have Averred, That the Defendants Corn was Ground at neither of them. It was Adjudged for the Defendant.

Skinner *versus* Webb.

Scire facias.

The Case was this: A Judgment was recovered in this Court in an Action upon the Case upon a Bill of Exchange, and a Scire facias was brought Quare execution, &c. and a Judgment upon that; upon which a Writ of Error was brought in the Exchequer Chamber, and the Judgment was affirmed; after which the Defendant died, and a Scire facias (rectifying the Judgment, and Affirmance of it in the Exchequer Chamber) was brought against the Administrator, and Judgment had upon that; and the Administrator brought Error upon the Judgment in the last Scire facias.

The Court were moved, not to allow this Writ of Error, or at least not to supersede Execution, by reason of its being a second Writ of Error.

And the Court held, that this Writ of Error did not lye into the Exchequer Chamber; tho' it hath been Resolved, that such Writ of

of Error lies in the Exchequer Chamber, (by the Statute of the 27th of Eliz.) upon a Judgment in a Scire facias, recovered upon a Judgment in an Action brought by Bill in this Court; because 'tis in Execution of the Judgment, and is (as it were) a piece of the first Action. Otherwise of a Judgment in a Scire facias upon a Recognizance, or the like.

Now this Scire facias is brought upon a Judgment affirmed in the Exchequer Chamber, which therefore is privileged from any other Writ of Error to be brought upon it there: So that this Writ of Error can be brought only upon the Judgment given in the Scire facias; and therefore it doth not lye into the Exchequer Chamber.

Jacob Hall's Case.

Complaint was made to the Lord Chief Justice by divers of the Inhabitants about Charing Crofs, that Jacob Hall was erecting of a great Booth in the Street there, intending to shew his Feats of Activity, and Dancing upon the Ropes there, to their great Annoyance, by reason of the Crowd of idle and naughty People that would be drawn thither, and their Apprentices inveigled from their Shops.

Upon this the Chief Justice appointed him to be sent for into the Court, and that an Indictment should be presented to the Grand Jury of this matter; and withal the Court warned him, that he should proceed no further.

But he being dismissed, they were presently after informed, that he caused his Workmen to go on. Whereupon they Commanded the Marshal to fetch him into Court: And being brought in and demanded, How he durst go on in contempt of the Court; He with great Impudence affirmed, That he had the King's Warrant for it, and Promise to bear him harmless.

Then they required of him a Recognizance of 300 l. that he should cease further Building; which he obstinately refused, and was Committed: And the Court caused a Record to be made of this Nuisance, as upon their own view (it being in their way to Westminster); and awarded a Writ thereupon to the Sheriff of Middlesex, Commanding him to prostrate the Building.

And the Court said, Things of this nature ought not to be placed amongst Peoples Habitations, and that it was a Nuisance to the King's Royal Palace; besides, that it straitned the Way, and was insufferable in that respect.

The King versus Wright.

An Indictment was against him for suffering of two persons to escape, qui commissi fuerunt by the Justices of the Peace, for an Offence against the Statute of 8 H. 6. of Forcible Entry.

After Verdict for the Plaintiff, and Judgment, a Writ of Error was brought, and assigned for Error, That it was not expressed how the Commitment was, whether upon View of the Justices, or Verdict upon an Indictment; so that it doth not appear that they were legally Committed, nothing of the Proceedings being set forth, and 'tis not so much as said, debito aut legitimo modo commissi fuerunt. If a man be Indicted of Perjury in his Oath sworn before a Master in Chancery; it must be shewn, that the Master had an Authority to take an Oath.

And the Court doubted at first, and commanded the Clerk of the Crown to search Presidents, and he found that they were most debito modo commissi; but some without that Clause: And the Court held, it being but inducement to the Offence whereupon this Indictment is, that it was well enough alledged, and after the Verdict they must intend the Commitment was legal. Vide Crompton's Justice of the Peace 252. a. and 255. there are two Presidents like this.

Note, It was said by Hale, that upon non Assumpsit Infancy might be given in Evidence, tho' upon Non est factum it could not.

The King *versus* Alway and Dixon.

Error to Reverse a Judgment upon an Indictment; because the Award of the Venire was Entred, Præceptum fuit Vicecomiti, &c. which is more like an History of the Record, than the Record it self; for it ought to be Præceptum est, and so are the Presidents: And for this Cause it was Reversed.

Waldron *versus* Ruscarit.

Hill. ult. Rot. 225. In an Ejectment a Special Verdict was found, That one levied a Fine of all his Lands in Saint Inderion in Cornwall, and that he had Lands in Portgwyn, and that the Constables of Saint Inderion exercised their Authority in Portgwyn; and that Portgwyn had a Tythingman.

And whether this Fine conveyed the Lands in Portgwyn was left to the Judgment of the Court, and Resolved that it did.

A Parish may contain ten Vills, and if a Fine be levied of the Lands in the Parish, this carries whatsoever is in any of those Vills. So where there are divers Vills, if the Constablewick of the one goes over all the rest, that is the Superiour or Mother Vill, and the Land which is in the other shall pass per nomen of all the Lands in that: And tho' it be found that Portgwyn had a Tythingman, Decenarius, which prima facie is the same with a Constable, and differed little in the Execution of that Office concerning

cerning Keeping the Peace: Yet Hale said, He was not the same Officer; and 'tis found that the Constables of St. Inderion have a superintendency over Portgwyn, and therefore 'tis but as an Hamlet of St. Inderion. But if found that they had distinct Constables, and could not interfere in their Authority, it would be otherwise, Owen 60.

Note, It was said by the Court, That if there be a Conviction of a Forcible Entry upon the View of the Justices of the Peace, no Writ of Error lyes upon it; but it may be Examined upon a Certiorari.

The King *versus* Green & al'.

They were Indicted for refusing to take the Oath of Allegiance contained in the Statute of 3 Jac. tendyed to them at the Sessions of the Peace.

One appeared, and the Entry was *Nihil dicit, &c. ideo remansit Dom' Rex versus eundem indefensus.*

And the other were Convicted, and Judgment given quod forisfaciant omnia bona & catalla, terr' & tenementa Domino Regi, & extra protectionem Dom' Regis ponantur & committuntur, & quilibet eorum committitur Gaolæ. They brought Error. And,

First, It was moved, that the Indictment was for refusing the Oath contained in the Statute of 3 Jac. in his Anglicanis Verbis, (Viz.) I do truly and sincerely acknowledge, &c. that our Sovereign Lord, King Charles the Second, is Rightful King of this Realm, &c. Whereas the Statute is King James; and the words of the Statute are, That the Justices of the Peace shall demand of such persons there mentioned, to take the Oath hereafter following. So that 'tis tyed up to that Oath in terminis, and then it cannot be Administred after the Death of King James. And the diversity of the Penning of this Act of 3 Jac. and the Act of 7 Jac. was observed in the last; the words are, Shall take and receive an Oath according to the Tenour and Effect of the Oath contained in 3 Jac. which is as much as to say, the same Oath in substance. So the Act of 1 Eliz. cap. 1. is, That the Oath shall be taken according to the Tenour and Effect hereafter following. Therefore it was Objected, that the Indictment might have been upon the Act of 7 Jac. but not upon 3 Jac. which it was conceived was tyed up to the Person of King James, and therefore determined by his Death. As if a Lease be made durante bene placito Regis nunc, it doth end by the Dimise of that King that made it: Otherwise, if it be durante bene placito Regis, Moor pl. 311. And though these Statutes for the Oath of Allegiance be General Laws, and need not have been recited; yet when an Indictment is grounded upon an Act therein mentioned, which will not maintain it, it shall not be made good upon any other General Act.

Secondly, Another Matter insisted upon for Error, was in the Entry of the *Nihil dicit*, which was, *Ideo remansit Dom' Rex versus eundem indefensus*, whereas it ought to have been remaner, and so the Record it self must express: But as it is, 'tis but an History of the Record, and therefore upon Indictments where the Award of the Venire is *Præceptum fuit*, 'tis not good, but should be *Præceptum est*.

Thirdly, An Exception was taken to the Venire, which Commands the Sheriff to Return 12 probos & legales homines, qui nec Dom' Regem nec aliquam partem aliqua affinitate attingunt; whereas in the King's Cases his Kindred may be Returned, and therein no Challenge to the favour, neither ought the Sheriff to be restrained from Returning them.

Fourthly, The Judgment is, *Committuntur*, & quilibet eorum committitur, which is an Execution of the Judgment, that should have been given, and not the Judgment it self, which ought to have been *Committantur*, &c. as 'tis extra protectionem Domini Regis ponantur, and not ponuntur.

Fifthly, It was alledged, that the Statute was mis-recited in two places:

1. For See of Rome, it is written Sea of Rome; so instead of *sedes Romana*, it is *mare Romanum*, which makes it to be no Sense.

2. The Words of the Statute are, I do declare in my Conscience before God, whereas the Indictment is, I do declare, &c. in Conscience, and leaves out my.

It was also Objected, That the words of the Act being, That such as refuse the Oath shall incur the danger and penalty of *Præmunire* mentioned in the Statute of 16 R. 2. which Enacts, That Process shall be made against the Offenders therein mentioned by *Præmunire facias*, in manner as 'tis Ordained in other Statutes. And it appears that no such Process was made upon this Indictment; wherefore the Statute is not observed.

Curia. The first Error was disallowed by all the Court, and held clearly, that the Judgment was well grounded upon the Statute of 3 Jac. For the naming of the King is but an instance of the thing as it stands at present; and it might as well be objected, that the Oath in the Statute is, I A.B do swear, &c. And tho' some Statutes say according to the Tenour and Effect, and this is the Oath hereafter following; it was held to be all one, for according to the Tenour and Effect, and according to the words are all one, as where a *Certiorari* is to certify Tenorem Recordi.

The second was held to be Error, and that the Judgment given upon the *nihil dicit* must be reversed, (for there were several Judgments given) (viz.) One upon that, and another given against the rest, which therefore was not affected by that Error.

The

The fourth was overruled; for where the Party is present, the Judgment is always quod committitur, as appeared by the Presidents.

Fifthly, the Variances from the Statute were not held to be material; for in Old writings 'tis written Sea of Rome; and declaring in Conscience, and in my Conscience, are the same.

The sixth Error was also disallowed, for the words of the Statute are, shall incur the danger and penalty of *Præmunire* mentioned in 16 R. 2. which doth not necessarily bind up to the Process; but means that such Judgment and Forfeiture shall be, and it appearing that the Parties were present, there was no need of any Process.

Vid. 16 R. 2. 5. which makes this very clear.

But as to the third Exception which was taken to the Verdict, they said they would be advised until the next Term; and they told the Prisoners (who were Quakers, and had brought a Paper which they said contained their acknowledgment of the Kings Authority, and Profession to submit to his Government; and that they had no exception to the matter contained in the Oath, but to the Circumstance only, and that they durst not take an Oath in any Cause which they prayed might be read, but it could not be permitted) that their best course were to supplicate his Majesty in the mean time for his Gracious Pardon.

Radly and Delbow *versus* Eglesfield and Whital.

IN an Action sur 13 R. 2. cap. 5. & 2 H. 4. cap. 11. for suing the Plaintiff in the Admiralty, for a Ship called the *Malmoise*, pretending she was taken piratick; whereas the Plaintiff bought her *infra corpus Com.* It seems there was a Sentence of Adjudication of her, to be lawful Prize in Scotland in April 1667. as having carried bellicos apparatus (i.e. Contraband Goods in the late Dutch War,) and the Plaintiff bought her here under that Title.

The Libel was, That the Ship belonged to the Defendants, and about January 1665 was laden with Masts, &c. and had Letters of safe conduct from the Duke of York to protect her from Confiscation, &c. and that certain Scottish Privateers did practise to take the said Ship; and after the Defendants took her, and being requested, refused to deliver her, and that *ratione lucri cessantis & damni emergentis*, they suffered so much loss, &c.

The Defendants pleaded Not guilty to this Action, and upon the Tryal would not examin any Witnesses, but prayed the Opinion of the Court; who said there was good Cause upon the Libel, (which now they must take to be true) in the first instance for the Admiralty to proceed. In 43 Eliz. it was resolved, If Goods are taken by Pirates on the Sea, tho' they are sold afterwards at Land,

1 Cro. 885.
Yelv. 125.
Sty. 418.

yet

1 Rolls 531
Hob. 78.

yet the Admiralty had Conusans thereof; for that which is incident to the original matter, shall not take away the Jurisdiction, and that is Law. tho' there were another Resolution in Bingleys Case, 3 Jac. 7 Ed. 4. 14 and 22 Ed. 4. If Goods are taken by an Enemy, and retaken by an Englishman the property is changed: Otherwise, if by Pirates. And if in this Case the taking were not Piraticè, it ought to have been alledged on the other side. Had the Sentence in Scotland been pleaded in the Admiralty, the Court would have given deference to it; as if a Man had a Judgment in Comuni Banco, and should begin a Suit for the same in Banco Regis; This might be made a good Plea to the Suit, but not to the Jurisdiction; for, for ought appeared this might have been the first Prosecution, and no Proceedings might have been in Scotland.

This came to be tryed at the Nisi prius before Hales, who was of the Opinion, ut supra, then. But because it was a cause of weight, he ordered it to be tryed at the Bar. And because 'twas for his satisfaction, and for a full Resolution, the Jury was paid between the Parties. Note, A Proctour sworn a Witness said, when this Cause was in the Admiralty, there was a provisionate Decree, as they call it, or primum Decretum, which is a Decree of the Possession of the Ship, and upon that an Appeal to the Delegates; but my Lord Keeper being informed, that no Appeal to them lay upon it, because it was but an interlocutory Decree, upon hearing of Counsel he superseded the Commission.

When a Ship is so seized upon security given, 'tis the course of the Admiralty to suffer her to be hired out.

Watkins *versus* Edwards.

5 Eliz. c. 4.

PAsc. 22 Car. 2. Rot. 408. An Action of Covenant was brought by an Infant per Guardianum suum, for that he being bound Apprentice to the Defendant by Indenture, &c. the Defendant did not keep, maintain, educate and teach him in his Trade of a Draper as he ought, but turned him away.

The Defendant pleads, That he was a Citizen and Freeman of Bristol; and that at the General Sessions of the Peace there, there was an Order made, that he should be discharged of the Plaintiff for his disorderly living, and beating of his Master and Mistress; and that this Order was Enrolled by the Clerk of the Peace, as it ought to be, &c. To this the Plaintiff Demurs.

The First question was, Whether the Statute extends to all Apprentices, or only such as are imposed upon their Master by the Justices and compellable to serve. And Hale and Moreton inclined, That it did not extend to all Apprentices. Twisden and Rainford contrary.

Secondly,

Secondly, Whether they had power to discharge the Master of his Apprentice, as they might, & è Converso.

Hale conceived they could not, But cause the Servant to have due Correction, in case the Master complained of him.

Twisden, Rainsford and Moreton Contra. For he may be so incorrigible, that the Master cannot keep him without standing in continual fear; and in Mich. 21, and Hill. 2. & 22 Regis nunc, upon the removal of an Order of Sessions from York, it was resolved, That the Master might be eased of his Apprenetice by the Sessions upon just cause. And Twisden said, Shelton Clerk of the Peace for Middlesex informed him, that such Orders are frequently made.

Hank-
worthy's
Case.

Thirdly, The great question was, whether the Defendant ought not to have applied himself to one Justice first, as the Statute directs; that he might (if he could) have settled the business, and if not, then to go to the Sessions, and not to go thither per saltum, as upon the Statute of the 18 Eliz. cap. 3. The Sessions cannot make an Order for keeping of a Bastard, but upon an Appeal from the two Justices, which are first to make an Order.

Hale, This case differs; for the 18 Eliz. gives the first Men power to make an Order, which shall bind the Parties until it is avoided by Appeal; but this Statute of 5 Eliz. gives no Jurisdiction to the first Man, for he is only to compound the business if he can.

Twisden, The discharge being set forth in an Order, we must intend it duly made; 'tis the common practice to go to the Sessions first. (It was moved at first, that it did not appear that the Plaintiff had Notice; but that Point was waived, for being in a judicial proceeding, it shall be intended.) Et Adjurnatur.

Lucy versus Levington.

PAsc. ult. Rot. 96. Covenant by the Plaintiff as Executor of J. S. for that the Defendant covenanted with J. S. his Heirs and Assigns to levy a Fine, &c. and that they should enjoy the Lands against all persons claiming under Sir Peter Vanlore; and then he says that Sir Robert Crooke, and Peter Vandebendy in the Executors life time, did enter claiming under Sir P. Vanlore, &c.

The Defendant pleads, That he had a good and indefeasible Title in the Lands at the time of the Covenant, by virtue of certain Fines from Sir Ed. Powel and his Wife; but that in 13 Regis nunc, there was an Act of Parliament, by which these Fines were made and declared to be void, and that Sir R. C. and P. Vandebendy had Title, and entered by reason of the Act, and not otherwise. (The Act which was pleaded in hæc verba recitatur, that certain Men came with armed force, and thereby extorted, and took the Fines, &c.) And to this the Plaintiff demurred.

It

It was urged for the Defendant, That this Title was by matter subsequent to the Covenant, and not any thing which was in being then; as 9 Co. 106. Sir T. Gresham conveys Land to certain uses, with power of Revocation, and then does revoke, and Aliens and dies; the Revocation was not warranted by his power, but was after made good by Act of Parliament, and then Process went out against his Widow for a Fine, for the Alienation of Sir T. G. the Lands being of capite tenure; but she was discharged, because the Alienation had its effect by an Act of Parliament, which can do no wrong.

Twisden. 'Tis hard this should be a breach; for the Defendant cannot be intended to Covenant against an Act of Parliament, a thing out of his power. Baron and Feme levied a Fine, J. S. Covenants, that the Conusee shall enjoy it, against all lawfully claiming from B. and F. brings Dower after the Death of B. the Conusee does not plead the Fine, but suffers Judgment and brings Covenant against J. S. and adjudged against him; for the Covenant shall not extend to a Right which is barred, and besides she did not claim lawfully. There is an Old Book which says, that if an Attainder be reversed by Parliament, the person shall have Trespass against him, which took the profits of his Land in the interim.

Hale. My Lady Greshams Case is not like this for there the party was in by the Queens consent to the Alienation by the Act she passed; but here the Covenant is broken, as much as if a Man recover Land, and then sell and Covenant thus, and then it be evicted in a Writ of Right; for this is in the nature of a Judgment. Tho' it be by the Legislative power, it may be the prospect of this Act was the reason of the Covenant; nor has the Defendant reason to complain, for the Act was made because of his own fraud and force. Every Man is so far party to a private Act of Parliament, as not to gainsay it, but not so as to give up his Interest; 'tis the great question in Barringtons Case, 8 Co. the matter of the Act there directs it to be between the Forresters, and the Proprietors of the Soil; and therefore it shall not extend to the Commoners, to take away their Common. Suppose an Act says, Whereas there is a Controversie concerning Land between A. and B. 'Tis Enacted, That A. shall enjoy it, This does not bind others, tho' there be no saving, because it was only intended to end the difference between them two. Whereupon Judgment was given for the Plaintiff.

It was agreed by all the Justices, that tho' the Covenant were made only to J. S. his Heirs and Assigns, and it were an Estate of Inheritance; yet the Breach being in the Testators Life time, the Executor had well brought the Action for the Damages.

Peter versus Opie.

In an Assumpsit the Plaintiff declares, That there was an Agreement between him and the Defendant, that he (the Plaintiff) should pull down two Walls and build an House, &c. for the Defendant; and that the Defendant should pay him pro labore suo in & circa divulsionem, &c. 8*l.* and that in consideration that the Plaintiff assumed to perform his part, the Defendant assumed to perform his: And the Plaintiff avers, that he was paratus to perform all on his part, but that the Defendant had not paid him the Money: And after a Verdict for the Plaintiff it was moved in Arrest of Judgment, That he did not aver that he had done the work.

Hale. Pro labore, here makes a Condition precedent, and therefore the performance of the work ought to have been averred; for tho' in case of a Reciprocal Promise, performance need not be averred, yet if the Promise refers to an Agreement, which contains a Condition precedent, the performance of that must be averred; as if I should promise one to go to York, and in consideration of that he promise to pay me 10*l.* there needs no averment of my going to York; otherwise, if the Counter promise were to pay 10*l.* for my going to York. So if the Counter promise were to do a thing after a time (ascertained or to be ascertained,) it must be averred that the time is past. Therefore, that it is laid by way of Reciprocal promise will not concern much, for every Agreement is a Reciprocal promise; but the matter is, what the Agreement is. Here tho' the Reciprocal promise be the foundation of the Consideration, yet 'tis to be considered, that it refers to a Conditional promise or an Agreement, and the Promise obliges not the Defendant to do it otherwise than according to the Agreement. Now to shew this pro labore makes a Condition precedent. Suppose the Agreement to be in writing thus, Memorandum that J. S. agrees and promises to build, and J. N. promises to pay him so much for his pains, it cannot be taken but that the building must be precedent to the payment. 'Tis the common way of Bargaining, and in common dealing men do not use to pay before the work be done; it would be inconvenient to give cross Actions in such cases especially, since 'tis likely that the Workman is a poor Man. 'Tis true, if there be a time limited for the payment, which time may fall out before the work or thing be done, there the doing it, is not a precedent Condition. Vivian and Shipping, 3 Cro. An Award that one should pay 10*l.* and in Consideration thereof, the other should become bound, &c. adjudged the paying the 10*l.* was a Condition precedent, (5 or 15 H. 7. 10.) is our Case in Point, if the Plaintiff had alledged that he had offered to work, and the

Defendant had binded him, it had been good. The want of the Averment is not helped by the Verdict, for 32 H. 8. extends not to Declarations of Avowry's, but only to Pleading; if otherwise, there had been no need of 21 Jac. cap. 13. to cure the want of averring the Parties Life.

Twisden Contra. There is no need of the Averment, there being Reciprocal promises, upon which the Parties have mutual remedies, and relied upon the case, 1 Roll. 46.

Rainsford agreed with Hale. Et Adjournatur.

Termino Sancti Hillarij, Anno 23 & 24 Car. II.

In Banco Regis.

Harwoods Case.

HE was committed to Newgate by the Court of Orphans, and upon an Habeas Corpus it was returned, That the City of London is an ancient City, and that time out of mind the Mayor and Aldermen have had the custody of Orphans within the City, until the Age of 21 or Marriage, and that there hath been time out of mind a Court of Record, (called the Court of Orphans) holden before them, having Conusance of all matters concerning Orphans, and that they had power to give Licence to Marry a Woman which was their Orphan, or to deny it upon reasonable cause; and if any one did Marry such Orphan without Licence first had from the said Court, that they might impose a reasonable Fine upon him, and if he should refuse to pay it, or to give Security, to commit him to Prison. It was also returned, That *Harwood* did Marry such an Orphan without Licence first obtained, whereupon he being present in Court they fined him 40 l. and he refusing to pay it, or give Security was committed.

To this return First it was objected, That this Custom shall not bind Strangers, in 1 Cro. 689. *Deanes Case*, who was imprisoned for refusing to find Sureties for the Good Behaviour, which was demanded of him, because he called an Alderman Fool. It was returned, That if a Freeman commit such an Offence, &c. So in *Andrews Case*, in *Hutton* 30. one was imprisoned for not giving Security for the payment of a Legacy, devised by his Testator to an Orphan, he is returned to be a Freeman.

Secondly, This Custom as returned is unreasonable, for it would oblige Strangers at what distance soever from London, who cannot

cannot take notice who are Orphans of the City; yet they should incur a penalty by Harrying them without leave from the City, and they have not returned, that Harwood married the Orphan within the City; and therefore it must be intended that he did not, and in all other Points most advantageously for him, in regard he cannot shew the truth of his Case by pleading to the Return. In an Action upon the Statute of Labourers, the Plaintiff declared, That he retained a Servant at London, and that the Defendant retained him within the Term he had contracted with him for. The Defendant pleaded, that he found him vagrant in another County, and there retained him, and held that it was a good plea, for he was not bound to take notice of a retainer by the Plaintiff, when it was in another County, 17 E. 4. 7. b. The difference is taken between Customs, general such as Gavelkind, and private particular Customs, the one everyone shall take notice of, but not the other, 3 Cro. Launder and Brooks Case. The Court of Orphans is a particular Jurisdiction, and not to be extended all over England; and it appears by the Books, that they may have a Ravishment of Ward, F. N. B. 142 B. Hob. 95. which therefore seems to be their proper remedy, rather than the course they have now taken.

Thirdly, The Custom is unreasonable, that they should impose the Fine who are to have it, and so to be Judges and Parties.

Fourthly, It was alledged, That the Fine was unreasonable, which is not to be proportioned to the Portion the Orphan is to have, (which was shewn in the Return to be 800 l.) but to the crime, for it doth not appear, that the City is to have the value of the Marriage, or any benefit by it; and in this Case there was no disparagement, for his quality deserved such a Portion, and he had the consent of her Friends.

But notwithstanding these Exceptions, to the Return it was resolved by all the Court, that he should be remanded.

As to the 1, that it is not returned, Harwood is a Freeman, the Court resolved, that it is not material, for in many Cases Strangers are bound by the Customs of London, as that of Foreign bought and Foreign sold, was resolved to be a good Custom, 15 Car. 2. between Hutchins and Players in Communi Banco.

2. Tho' it appears the Marriage was in a Foreign County, and not shewn that he had Notice; it is all one, for if that might be an excuse, the Government of Orphans by the City of London would be utterly insignificant, for it would be only to seduce the Orphan out of the Liberties of the City, and whatever practice there were to disparage her in a Marriage, it would be dispunishable by them; and Notice in this case is impossible to be given, but most easie to be taken, for what more proper, than for a Man to inform himself of the Condition of her, whom he intends to

make his Wife? and if Notice were requisite, it must be given to all the Men in England capable of Marriage, and in what manner should that be, by firing it like a Proclamation to some notorious place in the County? Yet it would be then hard to maintain, that a Man was bound to take notice of such a thing; the Statute of this King, that takes away the Court of Wards, saves and confirms the Jurisdiction of the Court of Orphans in London, which being in a general Law is within every mans Notice; for the Case of taking away a Mans Servant in a Foreign County to that he was retained in, is not like to this, for if he be detained after demand made, he which first retained him may have an Action, and so is at no loss; but here there is no remedy by undoing the Marriage, and therefore 'tis fit the rashness of it should be punished. This Custom concerning Orphans, is not confined to the Walls of London in many particulars. All the Children of a Freeman tho' he dies, and they were born out of London, shall yet be Orphans; If a Legacy be bequeathed to a City Orphan in any Foreign County, the Executor, &c. shall be compelled to give Security to the Court of Orphans for the payment of it. *Ex vid. Luch's Case*, in *Hob. 247*. The interest of the City adheres to the person of the Orphan where ever he is; as a Citizen of London shall have his personal Privileges in all places, as exemption from Toll, Prifage, (*Quere the last*) (per Hale) And as well as they may have a Raviſhment de gard, in what County soever the Orphan was taken, so they may punish an unlicensed Marriage. *Wallers Case*, 22 Jac. was the same with this which was resolved for the City. It appears by the Return that Harwood was present in Court; and Hale said, they could not award Process into a Foreign County.

3. It doth not appear by the Return, that the Mayor and Aldermen are to have the Fine, and then it shall not be so intended. But in *Eastwick and Langhams Case*, (which Langham was fined for refusing the Office of a Sheriff, being a Freeman;) it was held they might set the Fine, tho' they were to have it themselves.

4. It was held the Fine was not excessive: But in regard there was no disparagement by the Marriage, it was propounded by the Court, that upon the submission of Harwood to the Court of Orphans, that they should do well to remit the Fine.

St. Aubin versus Cox.

A Prohibition was prayed to the Court of the Compter in Woodstreet, London, to an Action of Debt there commenced; for that the Defendant had pleaded before any Imparlance taken, that the Cause of Action did arise at a place out of their Jurisdiction, and offered to have sworn his Plea, and they refused to accept this Plea. Upon

Upon this Matter a Prohibition was granted; for Inferiour Courts have not Cognizance of Transitory things, which arise in places out of their Jurisdiction, as F. N. B. 45. is: But then 'tis not sufficient to surmise such Matter for a Prohibition; but a Plea to that effect must be tendered in the Inferiour Court, and that before any Imparance taken (whereby the Jurisdiction would be admitted) and it must be upon Oath; and then if refused, a Prohibition shall be granted; or upon such Refusal, a Bill of Exceptions may be made, and Error assigned, Fitz. N. B. 21. N.

The King *versus* Serjeant and Annis.

They were Indicted of Perjury committed in their Evidence, given upon an Indictment of Barretry against Nurse (the Record of which was recited in this Indictment, and therein it appeared that the Venire was made Returnable coram J. S. & J. N. Justiciariis prædictis, and at a day certain,) and Judgment given, and Error brought and assigned, that the Venire being Returnable coram Justiciariis prædictis, none but the same Justices could proceed, and not those who sat the next Assizes by virtue of a New Commission: And therefore the Proceedings before them were coram non Judge, and so no Perjury could be committed.

Secondly, The Venire should not have been Returnable at a Day certain, but ad proximas Assisas; because 'tis uncertain when the Assizes begin, and if they should fall out to begin upon the very Day, yet it would not help the Error in the first award of the Venire. Sed non allocatur.

For the Statute of 1 & 2 E. 6. enables New Commissioners of Oyer and Terminer to proceed where the former left, before whom the Matter commenced.

And for the other Exception, it makes the Proceedings only Erroneous; and while the Record stands unreversed, the Perjury may be well assigned. It was said at the same Assizes, that the Judges may Adjourn to a Day certain; but if there be a Continuance over to the next Assizes, there must be no day expressed. But Inferiour Courts cannot make a Continuance ad proximam Curiam, but always to a Day certain.

Stanlack's Case.

Upon an Inquisition super visum Corporis before the Coroner, it was found that he died of a Meagrim at Greenwich.

Sir Edward Thurland moved for a Melius Inquirendum, producing several Affidavits, That Stanlack was Riding in the Highway, and a Coach with six Horses rushing by him, cast him from his Horse

Horse and killed him; and that divers offered to prove this before the Coroner, and he would not hear them: And if this Enquest should stand, the King would lose his Deodand; and alleged, that there were several Presidents of this Nature, as in one Michael Bartholomew's Case, and Toom's Case, who Hanged himself at Hackney about 15 years since.

The Court said in those Cases it was proved, that there was Practice with the Coroner to suppress the King's Evidence, and so the Inquisition was set aside upon a *Male se gessit*. If a Coroner omits to enquire, this Court as Supream Coroner throughout England, may Enquire, or may make Commissioners to Enquire, or Commissioners of Oyer and Terminer may Enquire; but then it is not *Super visum corporis*, and therefore may be Traversed. But Hale said, Where a Coroner hath Enquired, no *Melius Inquirendum* can go, as upon an Office found after the Death of the King's Tenant. For unless they could take some Exception to the Inquisition to quash it, the Coroner could not Enquire again; but if the Misdemeanour of the Coroner were somewhat more clearly made out, the Court said they would set the Inquisition aside, and cause a New one to be made.

Maynard's Case.

HE being produced as a Witness in an Action of Trover against Reynell Corey and others, for 12000 l. which the Defendants were charged to have conveyed away, which was the Money of Mr. Luttrell, lately deceased, and belonged to Mrs. Luttrell, now Plaintiff, as Executrix. He Swore, that the Defendants had the Money, and carried it out of the House wherein Mr. Luttrell died; and upon his Evidence principally the Jury found the Defendants Guilty.

Now the last Easter Term, which was about a year and an half since the Trial, Maynard made an Affidavit in the Kings-Bench, that Mrs. Luttrell had Arrested him amongst the rest, for the Taking away of this Money; and he being unable to put in Bail, and apprehensive of the Ruin that lying in Prison would bring upon him, he applied himself to Mrs. Luttrell, who promised him favour, so that he would accuse Reynell and the other Defendants with the taking of the Money, and be a Witness against them; and that he was Examined before a Justice of the Peace, (one A.) who did much urge him to depose against Reynell in this Matter. And that by their Threats and Promises he was brought to give False Evidence, and that what he said in his Testimony, relating to the Defendants taking away the Money, was untrue. After this Affidavit made he was Indicted of Perjury, in what he Witnessed in the Action of Trover, and confessed the Indictment.

Mrs.

Mrs. Luttrell thinking this matter might disparage her Verdict, brought an Information against him of Perjury committed in his Affidavit, to which he pleaded Not Guilty; but before the Trial made an Escape, so that at the Day the Enquest was taken by Default.

The Court were at first in doubt, whether they should proceed upon the Information, the King having taken his Confession upon the first, it seemed contradictory and repugnant to prosecute him upon this. But in regard the Affidavit charged Mrs. Luttrell and others with having suborned him to perjure himself, he might be tried upon that as another distinct Perjury, if so be they should be clear of having practiced with him. And upon the trial of this Information it did appear that he had charged them falsely, and so found Guilty.

Another Matter was moved, That the Indictment alleged the Perjury to be committed in Middlesex; whereas it appeared by the Affidavit produced, that it was taken at Justice Twisden's Chamber, in the Inner Temple; wherefore it ought to have been tried in London, where the Oath was taken; and tho' the Affidavit were filed in Court, that would not help it. But the Court agreed, if it had been in an Indictment it had been a good Objection, for there the Offence is local; but otherwise they said it had been held in an Information. And Twisden said, That if a Recognizance were taken at a Judges Chamber in London, and after filed in Court, the *Sche facias* upon it shall go first into Middlesex. However the Court offered to have this Matter found Specially; but there being no Counsel for Maynard, and this Matter stirred only per amicum Curia, it went off.

Austin's Case.

In an Indictment for Creating of Posts and Rails in an Highway, it was held necessary to prove, that the party Indicted did set them up, for a Continuation of them, for not suffering them to be removed, would not serve.

Hale: If there be no Special Matter to fix it upon others, the Parish where the Highway is, ought to Repair it of Common Right. (Sed Quære, Why not the County? as in the Case of Common Bridges, 2 Inst. 701.) Vide postea.

Butcher versus Cowper.

In an Indebitatus Assumpsit, the Defendant pleads in Abatement, that the Promise was, for carrying the Goods of the Defendant to a certain place; and if there were any such Contract, it was made with the Plaintiff and a Stranger. Upon which it was Demurred;

demurred; because to plead, if there were any such Contract, is not good, and more like an Affidavit to change a Verdict, than Pleading, and he ought to have averred that the Stranger was alive: Besides the Defendant had taken an Imparance, and therefore could not plead in Abatement. Wherefore it was Adjudged for the Plaintiff.

Smith versus Buterfield.

In *Crespatis Quare clausum fregit & bona asportavit*; the Defendant pleaded Not guilty to the breaking of the Close, and Justifies the taking of the Goods at a time varying from that alleged in the Declaration, and concludes *Quæ est eadem transgressio*, upon which it was Demurred; because he did not traverse the Time before and after; and it was Adjudged for the Plaintiff.

Toll versus Dawson.

In Debt upon a Bond Conditioned to perform an Award. The Defendant pleaded *Nullum fecerunt arbitrium*.

The Plaintiff Replies, and sets forth the Award, which did express the Bond of Submission to be Dated the 7th of February, whereas it was dated the 10th of February; and for that Misrecital the Defendant Demurred.

But the Court held clearly, that it did not hurt the Award; and so if the Submission had been of divers particular matters; yet if they had medled only with the things submitted, it had been well enough.

Proctor versus Newton.

In Debt upon a Bond, the Defendant demanded Oyer of the Condition, which was to perform Covenants in an Indenture; which recited, that the Defendant had sold to the Plaintiff a certain House; and there was a Covenant that the Plaintiff, *pacifice gauderet domum prædictam absque legali interruptione disturbantia sive impedimento* of the Defendant, or any claiming from or under him. Upon this Covenant the Plaintiff assigned the Breach thus: That J.S. habens jus & titulum virtute concessionis from J.N. ante tempus confectionis of the Bargain and Sale to him, did enter and expel him; Upon which it was Demurred; because not shewn that J.S. had a lawful Title, and therefore not well applied to the Condition, which is so expressly penned, 2 Cro. 315.

Hale: Habens jus implies it was a lawful Eviction.

Twisden doubted; because it may be J.N. Dissessed the Defendant before the Bargain and Sale, and made a Lease to J.S. Et Adjornatur.

Freeman versus Boddington.

Error of a Judgment in an Assumpsit against Baron and Fente, Hill. 21, 22; in Com. Banco. The Error assigned was; Rot. 116.

That the Feme was an Infant, and appeared by Attorney; whereas the Court ought to have admitted her per Guardianum. But if the Wife be of Age, then the Baron makes an Attorney for her and himself, and the Entry is per Attornatum of the Baron and Feme, and not the Baron only: And for this Cause the Judgment was Reversed.

And Hale said, that the Baron could not disavow the Guardian made by the Court for his Feme.

Lewyn versus Forth.

The Case was, Magdalen Colledge in Oxford being seised of an House and a Mill, demised it to Lewyn for 31 years: Lewyn Let the Mill to J. S. for five years, and after demised the House and Mill to Forth by Indenture for 31 years: Forth Covenanted to Repair the Premises durante termino predict' 31 annorum: J. S. refused to attorn; and whether Forth were bound to Repair the Mill was the Question; because it was alledged, that the Covenant was to Repair during the Term, and nothing in the Mill passed during the five years, for want of Attornment. But it was Resolved, that he was bound to Repair: For Hale said, Tho' the Lease did not commence in point of Interest, yet it did in point of Computation; and this Covenant was to Repair during the 31 years. Covenant.

Zouch versus Clay.

TRin. ult. Rot. 787. In Debt upon a Bond, the Defendant pleaded, Mo. 619. That at the time that he sealed and delivered the Bond, there was a Space left, wherein afterwards the Name of J. S. was put in, who also sealed and delivered it; supposing that the adding another Obligor, bound jointly and severally with him, was an Alteration material to avoid the Bond, and relied upon Pigot's Case Mo. 547. in the 11 Co. 1 Cro. 627.

But the Court held, that the Bond remained the same as to him, and he could not take advantage of this matter; and 'tis the common practice of Sheriffs, to make their Bonds for Appearance in this manner.

Sands *versus* Rudd.

In Debt upon a Bond, Conditioned to give Security by a certain Day, as the Chamberlain of London shall approve.

The Defendant pleaded, that there was no Chamberlain of London at the Day. Upon which it was Demurred, and Adjudged for the Defendant.

Parsons *versus* Perus.

Hill. ult. Rot. 1051. In an Ejectment, upon a Special Verdict the Case appeared to be thus: Two Women were Joynt-tenants in Fee; one of them made a Charter of Feoffment to J. S. and Livery within the View, and after (before it was Executed) married him.

And it was Objected, that this was not a good Feoffment, None will deny, but that the Death of either party makes a Livery within View (if not executed by Entry) ineffectual. And in Mo. 85. Dyer 5. If there be not an Entry immediately, a Livery within the View is not good; and in this case, by the Marriage, he becomes seised in the Right of his Wife, and cannot by his own Act divest himself of that Estate, or work a prejudice to his Wife, by putting the Estate out of her. Which makes it differ from the Case of the 38 E. 3. 11. b. Where a man made Livery of the within View to a Woman; and before she Entered, married her, and claimed the Estate in Right of his Wife; there held to be a good Feoffment: For in that case, there is no Alteration of the Estate consequent upon the Intermarriage. Neither is it like the Case of 2 R. 2. quoted in Forde and Hemling's Case in the 4 Co. Where a Woman grants a Reversion to a Man, and they Intermarry before Attornment: For there the Grant is to be perfected by the Act of a Stranger, which in reason should be more available to a man than his own Act.

But it was Resolved by all the Court, that this Livery was well Executed after the Marriage: For an Interest passeth by the Livery in View, which cannot be countermanded. The effectual part of it, (*viz.*) Go Enter, and take possession, was before the Marriage, tho' the Estate is not in the Feme while Entry. She hath done all on her part to be done, and hath put it meetly in the Feoffor's power, and when he Enters it hath a strong retrospect to the Livery, and shall be pleaded as a Feoffment when she was sole. If two Women Exchange Lands, and one marries before Entry; this shall not defeat the Exchange. The Cases of 2 R. 2. and 38 Ed. 3. are as strong.

Emerson

Emerson versus Emerson.

TRin. ult. Rot. 1389. Error of a Judgment in the Common Pleas, in an Action of Trespass by the Plaintiff as Executor, upon the Statute of 4 E. 3. De bonis asportatis in vita Testatoris. The Plaintiff declared, that the Defendant blada crescentia, upon the Freehold of the Testator, messuit defalcavit cepit & asportavit.

Upon Not Guilty pleaded, a Verdict and Judgment was for the Plaintiff, and assigned for Error, That no Action lay for Cutting of the Corn; for that is a Trespass done to the Freehold of the Testator, for which the Statute gives the Executor no Action, and while the Corn stands, 'tis to many purposes parcel of the Freehold. So that if a man cuts Corn and carries it away presently, tho' with a felonious intent, 'tis no Felony: Otherwise, if he let it lye after 'tis Cut, and at another time comes and steals it: So that it appears for parcel of the Trespass no Action lyes; then entire Damages being given as well for the Cutting, as Carrying away the Corn, the Judgment is Erroneous.

But all the Court were of another Opinion; for 'tis but one entire Trespass; the Declaration only describes the manner of Taking it away. Indeed, if it had been quare clausum fregit & blada asportavit, it had been naught; or if he had Cut the Corn and let it lye, no Action would have lain for the Executor. So if the Grass of the Testator be Cut, and carryed away at the same time; because the Grass is part of the Freehold, but Corn growing is a Chattel. The Statute of 4 Ed. 3. hath been always expounded largely.

Mr. Amhurst's Case of Grays-Inn.

Serjeant Maynard moved for a Mandatory Writ to the Mayor and Court of Aldermen of London, upon the Statute of 13 Car. 2. c. 11. to give Judgment according to the late Act of 22 nunc Regis. The Case was, That the Act appoints a Market to be on certain Ground set out in Newgate-Market; and in all such cases, for the satisfaction of the Owners of the Ground; (if the City cannot agree with them for it) it Impowers the Mayor and Aldermen to Empanel a Jury, who shall Assess and Adjudge what satisfaction and recompence shall be given to the Owners; and says, That the Verdict of such Jury, on that behalf to be taken, and the Judgment of the said Mayor and Court of Aldermen thereupon, and the Payment of the Money so awarded or adjudged, &c. shall be binding and conclusive to and against the Owners, &c.

Now there was Fifteen thousand Foot of Amhurst's Ground taken away for this purpose, and a Jury had been Empannelled, and had assessed and awarded him Two shillings a Foot; but the Mayor and Court of Aldermen refused to give Sentence of Judgment thereupon: This, says he, is a Ministerial thing, and this Court will interpose when any Officers will not do Justice, or will out-go their Authority: For there is the same Reason to command to do Justice, as to prohibit Injustice. A Bishop of Exon had fallen out with a Town in Cornwall, and denied them Chrisme; and a Mandamus went hence, to command him to give it them. Mr. Noy brought in a Copy of it.

Sir William Jones. This somewhat resembles a *Procedendo ad Judicium*; this is stronger than the Case of commanding a Bishop to grant Administration; there this Court commands them to observe a Statute, tho' it be in a Matter this Court has no Cognizance of. We can't have an Action on the Case.

Hale. If they don't make you Satisfaction, your Interest is not bound.

Maynard. But that is taken away by the same Act (Pag. 143. 4.) We are Lessee to the Dean and Chapter of *St. Pauls*.

Hale. 'Tis not Enacted, That they shall give Judgment; but that is implied: I never knew a Writ, commanding to grant Administration, tho' the Opinion has been so.

Sir William Jones. That was done in Sir G. Sandy's Case, after great Debate.

Then a Rule was made, to shew Cause why a Writ should not go.

Afterwards the Court granted a Writ, but bidded them to consider well of the Form, and to whom to direct it.

Loyd versus Brooking.

TRin. ult. 1046. The Case was, Tenant for Life, Remainder to his first Son in Tail, Remainder to J. S. for Life, Remainder to his first Son in Tail, &c. Tenant for Life after the Birth of his first Son, accepts a Fine from J. S. to certain uses; and then makes a Feoffment, after which the Son of J. S. is Born, and whether his Contingent Remainder were destroyed, or should vest in him, was the Question? And it was Resolved by the whole Court, upon the first Opening, that the Contingent Remainder was not destroyed; the acceptance of the Fine displaced nothing, the Feoffment divested all the Estates, but the Right left in the first Son in Remainder, supported the Contingent Remainders. By Lord Coke's Case 2 Rolls 796, 797. is stronger: He Covenanted to stand seised to the use of himself for Life, Remainder to his Wife for life, Remainder to his Daughter for Life (when born), Remainder

mainder to her first Son in Tail: And minding to disturb the arising of the Contingent Estates, attempted it by these two Means,

First, He grants the Reversion, and in the Grant recites the former Settlement; which Grant was without Consideration.

And, Secondly, makes a Feoffment: And it was Resolved, that the Grant should not hinder the arising of the Contingent Use; because the Grantee had Notice, and was therefore subject to the Covenant, to stand seized by the Grantor, and that the Feoffment should not destroy the Contingent Estate; because the right of Remainder for Life in the Daughter, upon which she might have entered for the forfeiture did support it, tho' indeed the Remainder for Life in the Wife would not, for the Feoffment by the Husband tolls her Right during the Coverture, *cui contradicere non potest*; upon which reason is Biggot and Smiths Case adjudged, 3 Cro. Now this is stronger than the Case at Bar, because the Settlement was by way of use, but here Act executed. The Case of my Lord Cooke was adjudged by Roll in Banco Regis, and after by Glyn. It hath been the most common way of Conveyancing, to prevent the disappointing Contingent Estates to make Feoffments, &c. to the use of the Husband, &c. for Life, Remainder to the use of the Feoffees for the Life of the Husband, and so on to Contingent Remainders; and the more modern ways have been to make the first Estate but for years; but in both Cases, he which hath the first Estate, cannot destroy the Remainders. It hath been a question, Whether a right of Action would support a Contingent Estate, but never doubted, but that a right of Entry would, *Vid. Archers Case, 1 Co.*

Katherin Austins Case.

An Indictment was found against her, that she *vi & armis* a certain part of the Kings High-way, (leading from Shorditch Church to Stoke Newington thorough Hogsdon,) *postibus & repagulis inclusit, &c.*

Upon a Tryal at Bar the principal question was, Whether the place where the obstruction was, were an High way.

Hale said, If a way lead to a Market, and were a way for all Travellers, and did communicate with a great Road, &c. it is an High-way; but if it lead only to a Church, to a Private House of Village, or to Fields, there 'tis a Private way. But 'tis a matter of Fact, and much depends upon Common Reputation. If it be a publick way of Common right, the Parish is to repair it, unless a particular person be obliged by Prescription or Custom. Private ways are to be repaired by the Village or Hamlet, or sometimes by a particular person. In the Case at Bar, it was found no High-way. Ante.

Castilian

Castilian *versus* Platt.

ERror of Judgment in Communi Banco, in Scire facias against three Executors, the Error assigned was, that one was an Infant.

Hale. No doubt a Scire facias lies against him; and seeing this case is, that he did not appear, Judgment was well given against him.

Symon Morle *versus* Willam Sluce.

Michael' ult. Rot. 421. An Action upon the Case was brought by the Plaintiff against the Defendant; and he declared, that whereas according to the Law and Custom of England, Masters and Governours of Ships which go from London beyond Sea; and take upon them to carry Goods beyond Sea, are bound to keep safely day and night the same Goods, without loss or subtraction, ita quod pro defectu of them, they may not come to any damage; and whereas the 15 of May last, the Defendant was Master of a certain Ship called the William and John, then riding at the Port of London, and the Plaintiff had caused to be laden on Board her three Trunks, and therein 400 pair of Silk Stockings, and 174 pound of Silk, by him to be transported for a reasonable reward of Freight to be paid, and he then and there did receive them, and ought to have transported them, &c. but he did so negligently keep them, that in default of sufficient care and custody of him and his Servants, 17 May, the same were totally lost out of the said Ship.

Upon Not guilty pleaded, a Special Verdict was found. (viz.) That the Ship lay in the River of Thames, in the Port of London in the Parish of Stepney, in the County of Middlesex, *prout*, &c.

That the Goods were delivered by the Plaintiff on Board the Ship, *prout*, &c. to be transported to Cadiz in Spain.

That the Goods being on Board, there were a sufficient number of Men for to look after and attend her left in her.

That in the night came 11 persons on pretence of pressing of Seamen for the Kings service, and by force seized on these Men (which were 4 or 5, found to be sufficient as before) and took the Goods.

That the Master was to have Wages from the Owners, and the Mariners from the Master,

That She was of the Burthen of 150 Tunn, &c.

So the question was upon a Tryal at Bar, whether the Master were chargeable upon this matter.

It was insisted on for the Plaintiff, that he who took Goods to carry them for profit, ought to keep them at his peril.

To which it was answered, That there was no negligence appeared in the Master. By the Civil Law, if Goods were taken by Pirates, the Master shall not answer for them; and this is not the Case of a Carrier, for tho' here the Goods are received at Land, yet they are to be transported, and being one intire Contract, they shall not be under one Law in the Port and another at Sea; the Master is not liable in case of Fire or Sinking the Ship; every one knows the Ship is liable to inevitable accidents, and there is no Case of this nature in experience. And Serjeant Maynard added, that this differed from the case of a Carrier, for that he is paid by the Owner of the Goods; but here the Master is Servant to the Owner of the Ship, and he pays him, and not the Merchant. Owen. 57.

The Court inclined strongly for the Defendant, there being not the least negligence in him; but it was appointed to be Argued, but since I've heard it was compounded. It was agreed on all hands, that the Master should have answered, in case there had been any default in him, or his Mariners.

Anonymus.

UPON a motion for Restitution after the Reversal of an Outlawry, Hale said that he must plead the Reversal to the seizure in Scaccario.

Puckle versus Moor.

Michael. ult. Rot. 461. A Promise was made seven years since, to pay Money within three Months after.

The Defendant pleaded Non Assumpsit infra sex annos ante exhibitionem Bille, whereas it should have been causa Actionis non accrevit infra sex annos; tho' in this case it appears within the Declaration, that the time of payment was not within six years before; yet because the Defendant had not pleaded it, he cannot have advantage of it.

Goff versus Loyd.

Michael. ult. Rot. 268. Trespass quare domum fregit, and took away so many Nails, &c.

The Defendant pleads Specially, and sets forth the two Acts for Hearth-Money, 14 Car. nunc. cap. 10. and 16 Car. nunc. cap. 3. in pursuance of which he distrained the said Nails, for the Duty due by those Acts out of a Smiths Forge, &c.

The Plaintiff demurred; So the sole question was, whether a Smiths Forge were within the Acts; it being once argued the last Term, the Court now gave their Opinion.

Moreton.

Moreton. I think a Smiths Forge ought to pay; 'tis a great part of the Kings Revenue, almost in every Village there is one, we should explain the Act liberally for the King.

Rainsford of the same Opinion; 'tis within the words (scilicet,) an Hearth whereon Fire is used, and within the meaning, for there is an exception of things not so properly Fire hearths as this, (viz.) Private Ovens. Where the Act excepts Blowing Houses, I take it is meant Glass houses, and the Houses at Ironworks; by Stamps I think is meant Presses, Calenders for Cloaths; by the very words, Houses that are not Dwelling Houses are charged. The objection that it is his Trade, is answered by the instance of Cooks, Chandlers, Common Ovens, Hearths of Tripewomen, who boil Neats Feet.

Twisden of the same Opinion, the words are general, yet I would not extend it to every Hearth that has a Fire upon it, as Stills and Alembicks, for so we might extend it to a Chafing dish of Coals; but we must take it for a Rule, to extend it to those things which are most general. A Smiths Forge is of such use, that 'tis found almost in every Village; therefore 'twas reckoned a great piece of hardship and slavery upon the Children of Israel, that they were not permitted a thing so useful amongst them. The exceptions enumerate particulars, therefore it excludes whatever is not expressed.

Hale. I would fain know how the fact is. Do Silver Smiths, &c. pay? It were too narrow to extend it only to Common Chimneys, and too great a latitude to extend it to every place where Fire is, where a Man can but warm his Hands. I suppose Boylers in Cooks Chimneys, and the Fireplaces of Worstead Combers do not pay, Common Ovens should have paid, tho' there were no exception of Private Ovens, for they never are, or can be without a Chimney. This is matter of fact, I have not enquired into, and I would be loath to deliver an Opinion without much inquiry; but 'tis very probable that they are Firehearths, and not excepted; but it appears plainly upon the Record, that 'tis a Firehearth, and by the general Demurrer 'tis admitted.

(Note, There was a Special Rule, that no advantage should be taken of the Pleading by either side.) But Hale said, he did not know how they were bound by that Rule.

Termino

Termino *Pasche*, Anno 24 *Car.* II.
In Banco Regis.

Monk *versus* Morris and Clayton.

THE Plaintiff after he had obtained Judgment in Debt became Bankrupt, and the Defendants brought a Writ of Error.

The Judgment was affirmed in the Exchequer Chamber, and the Record sent back.

Then a Commission of Bankrupts is sued out, and the Commissioners Assign this Judgment.

The Plaintiff sues out Execution, and the Money is levied by the Sheriff and brought into Court.

The Assignee moves, that it may not be delivered to the Plaintiff, surmising that the Judgment was assigned to him, *ut Ante*.

The Court said, they might have brought a Special *Scire facias*, which they having delayed, and that it would be hard to stay the Money in Court upon a bare surmise, and so ought appeared, it was the Plaintiff's due. But however, because it might be hazardous to deliver it to him, they consented to detain it; so that the Assignee forthwith took out a *Scire facias* against the Defendant, in order to try the Bankruptcy, or otherwise, that it should be delivered to the Plaintiff.

Sir Ralph Boyes Case.

IN an Ejectment upon a Tryal at Bar, the Case appeared to be this. Sir William Drake was seized in Fee of the Lands in question, and 19 *Car.* 1. infeoffed Sir William Spring, and five others, to such uses as he should declare by his Will in Writing, or by his Deed subscribed by three Witnesses. In August 20 *Car.* 1. by his Deed, *ut supra*, he limits the use of the said Lands to his Brother Francis Drake for 90 years, and declares, That the Feoffees should be seized to their own use, in Trust for the said Francis Drake and his Heirs, with a power to Francis Drake to alter and limit the Trust as he should think fit.

In the same Month there is a Treaty of Marriage between F. D. and the Daughter of Sir William Spring; and it was agreed by certain Articles between F. D. and Sir W. S. &c. reciting that he should receive 2500 *l.* with his intended Wife, (which Money was proved to be paid,) that F. D. should convey the Lands in question to

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himself

himself and his Wife, and the Heirs Males of their two Bodies, &c. for the Joynture of the Wife.

The Marriage afterwards in 20 Car. takes effect, and soon after the same year F.D. by Indenture between him Sir W.S. and another) reciting the Articles of Marriage, Assigns his Term of 90 years, to Sir W.S. and the other in Trust to himself for Life, the remainder to his Wife for Life, and after to the Heirs Males of their two Bodies; and by the same Deed limits the Trust, of the Inheritance of the Lands in the same manner.

Afterwards in 23 Car. 1. he in consideration of 6000 l. (proved to be paid) Grants out of the said Lands a Rent of 400 l. per annum, to Sir Ralph Bovy and his Heirs, with power to enter into the Land, in case the Rent was not paid, and to retain it until satisfaction.

Afterwards F.D. and his Wife dye, the Rent was Berear. Sir R. Bovy enters, Sir Will. Spring, and the other Trustees Assign the term of 90 years, to Sir Will. Drake, Heir Male of F.D. and his Wife the Lessor of the Plaintiff. In this case, these Points were agreed by the Court.

First, That when Sir W.D. enfeoffed others to such Uses as he should declare by his Will or Writing; that if he had in pursuance of that Feoffment limited the Uses by his Will, that the Will had been but Declaratory, tho' if he had made a Feoffment to the Use of his Will it had been otherwise, according to Sir Ed. Croces Case, 6 Co. And Hale said, my Lord Co. made a Feoffment, (provided that he might dispose by his Will) to the use of the Feoffee and his Heirs; and resolved, in that case he might declare the Use by his Will; which should arise out of the Feoffment.

Secondly, That this Settlement being in pursuance of Articles made precedent to the Marriage, had not the least colour of fraud, whereby a Purchaser might avoid it; and if there had been but a Verbal Agreement for such a Settlement, it would have served the turn. And the Court said, if there had been no precedent Agreement, so that it had been a voluntary Conveyance, tho' every such one carries an Evidence of fraud; yet is not upon that account, only always to be reckoned fraudulent, or to be avoided by a Purchaser upon a valuable Consideration.

Thirdly, Whereas it was objected, That the Trust of the Term which was but a Chattel could not be Entailed, and therefore the Term was liable to the Rent notwithstanding the Assignment of it, and limiting the Trust as before.

It was answered, and resolved by the Court; that if it had been a Term in Gross in F.D. the Trust of it could have been no more Entailed than the Term it self, but F.D. having the Term in Point of Interest, and at the same, the Trust of the Inheritance, might Entail the Trust of the Term, to wait upon the Inheritance; and

and that the Chancery does every day allow, which they should take notice of.

But then it was objected, that he ought to have limited the Trust of the Inheritance, and of the Term both together; but F. D. by a distinct Clause in the Deed limits the Trust of the Term which divides it, and makes it independent upon the Inheritance, the Trust of which he limits by another Clause.

So that it was said by the Court, that tho' the Limitations were by several Clauses, yet all must be taken as one entire Conveyance. And Hale said that in 1646, a Lease for years was assigned, and the Trust of it Entailed, and two days after the Trust of the Inheritance Entailed in the same manner; and it was held by the best Counsel then in England, that tho' this were done by several Deeds, and at several times; yet being in pursuance of one Agreement, that all was to be taken as one entire Act, according to the Case of 17 Jac. where a Fine was levied to Lessee for years, with an intent that he should suffer a Recovery, which was had the Term following, and resolved that his Term was not drowned. The Jury hearing the Opinion of the Court found for the Plaintiff for all, save a 12th part, for so much was drowned and surrendered by the Assignment of F. D. to Sir W. S. one of the six Joyn tenants of the Reversion.

Wood *versus* Coat.

AN Action for words, That the Defendant being indicted of a forcible Entry at the Sessions, and the Plaintiff produced as a Witness for the King, and Swore nothing but what was true; the Defendant after *habens colloquium* of the said Oath said, The Plaintiff took a false Oath against me at the Sessions *innuendo*, the said Oath, &c.

After Verdict for the Plaintiff it was moved, That the Action did not lye, for the Defendant might mean an Extrajudicial Oath. In Pritchards Case, 2 Rolls, where one said of him, He took a false Oath against me at the Assizes. It was held, that the Action did not lye. Sed non allocatur, for in that case there was no colloquium said, which is alledged in this case, and shews to what the words spoken did relate.

Bradnox Case.

AHabeas Corpus was brought to remove the Body of Bradnox, who was taken by Process upon a Plaint exhibited in the Court of the Sheriffs in London, and it was returned, That time out of mind the Mayor Aldermen and Common Council, of the City, have had the Government and Regulation of Trade within

the City, and power to make By laws concerning the same; and that they had made a By-law, that there should be but 420 Carrs allowed to work within the City, all which should be Licensed by the President of *Christs Church Hospital*, and that there should be paid for the License of every Carr 1 l. Fine. and 17 s. *per annum* to the said President, to be employed for the use of the Poor within the *Hospital*; and that none should use a Carr without such License, under a certain penalty to be recovered, &c. *Provided*, That all persons may send their own Carrs to the Wharfs, &c. and carry Goods in their own Carrs from Wharfs, except such as shall be Traders or Retailers in Fuel.

That B. without such License wrought with a Carr *pro lucro suo proprio*, and for the penalty forfeited thereupon, a Plaint was levied against him, &c.

It was prayed, that there might be no *Procedendo* in this Case, for tho' the By law should be admitted to be good, having a Custom to warrant it, as was adjudged in this Court, 19 Car. nunc, between Player and Jenkins; yet it appears that the Plaint is insufficient, for in that, no Custom is alleged; and in 1 Rolls 364. such a By-law to limit the number of Carrs was held void; for there no Custom is alleged to ground it upon, and then a By-law cannot restrain Trade.

Again, 'tis unreasonable, that such as Trade in Fuel should not be permitted to bring home the Wood, which they buy in the Country in their own Carts, or to carry it out to their Customers, for tho' they might limit the number of Carmen, which in too great a multitude would be a Nuisance, and infest the Streets; yet they cannot restrain a Man from using his own Carrs, to carry his own Commodities.

As to the First, The Court were of Opinion, that it was not necessary to mention the Custom in the Plaint, for 'tis *Lex loci*, and they take notice of their own Customs in their own Courts; As in Norwich the Custom is, that in Debt upon a Specialty the Debtor *faretur Scriptum*, sed *petit quod inquiratur de debito*, and no Custom is set forth in the Record to warrant that. But here in the Habeas Corpus they have returned the Custom, which shews they had good cause to proceed upon their Plaint; for it hath been often resolved, that Custom may create a Monopoly, as the case in the Register is; a Custom was, that none should exercise the Trade of a Dier in Rippon, without the Archbishop of Yorks License.

As to the Second the Court doubted, whether this By-law could be adjudged reasonable or good, because it would restrain the Woodmongers from bringing their Wood, &c. home in their own Carrs, so that tho' they brought it in the Country Carts as far as the Liberties of the City; they must then unload and put it in City Carrs, which would be extremely inconvenient, and so it would

would be if they should send City Carts to fetch it; and tho' it might be reasonable to prohibit them carrying their Commodities out in their own Carts, that they might not have so great an opportunity to cheat in their Measures; yet there could be no Colour to restrain them from bringing them in. *Et Adjornatur.*

Cuts versus Pickering.

UPON a Trial at Bar, one Baker (who had been Solicitor for Pickering) was produced as a Witness concerning the Rature of a Clause in a Will, supposed to be done by Pickering.

The Court were moved, Whether he could be Examined touching this, because having been retained his Solicitor, he should by reason of that be obliged to keep his Secrets? But it appearing that B. had made this Discovery to him, of which he was now about to give Evidence, before such time as he had Retained him, the Court were of Opinion that he might be Sworn. Otherwise, if he had been retained his Solicitor before: The same Law of an Attorney or Counsel.

Sir Samuel Jones versus the Countess of Manchester.

IN an Ejectment upon a Trial at the Bar, the Evidences which (as the Plaintiff pretended) would have made out his Title; and would have avoided the Settlement in Joynture, which the Countess of Manchester claimed, were locked up in a Box, which was in the Custody of a Stranger, who before the Trial delivered the Key to the Earl of Bedford, Brother to the Countess of Manchester, and Trustee for her; who being present in Court, and requested to deliver the Key, that the Box might be opened, which was brought into Court: He said, (being a Trustee in the behalf of his Sister) He conceived, he was not obliged to shew forth any Writings that might impeach her Estate; and if he should, it would be a breach of the Trust reposed in him, which he held sacred and inviolable.

The Court told him, That they could not compel him to deliver the Key: But Hales said, It were more advisable for him to do it. For he held, tho' it is against the Duty of a Counsellor or Solicitor, &c. to discover the Evidence, which he which retains him acquaints him with; yet a Trustee may and ought to produce Writings, &c. But they could not Rule him to do it here; and the Earl declaring his Resolution not to do it, the Plaintiffs Counsel desired leave of the Court to break open the Box.

The

The Court said, that they would make no Order in it, nor would determine how far the Title to the Writings bren in the property of the Box; or whether the delivering the Key to the E. did not amount to a Pledge of the Box.

Serjeant Maynard said, It was the course of the Chancery, when a Bill was Exhibited against a Joyntress, to discover Writings, not to compel her to do it till such time as the Plaintiff agrees to confirm her Joynture. And he knew a Bill of Discovery brought against a Purchasor upon a valuable Consideration; and the Court would not compel him to Answer, tho' it was proved there was a Deed and a real Settlement.

Upon opening the Evidence in the Case at Bar, these Points were stirred and Resolved by the Court:

That where a man makes a Feoffment, &c. to Uses, with power of Revocation, when he hath executed that Power, he cannot limit New Uses; but if it had bren with a Power to revoke and limit New, then he might revoke and limit New, with a power of Revocation annexed to those New; which if he doth afterwards revoke, he may again limit New Uses according to the first Power, and so in infinitum: But always the New Uses must correspond to those Circumstances, &c. which the first Power appoints, so that is the Foundation, 2 Rolls 262. Beckett's Case.

The Plaintiff being at a loss for his Writings, was Nonsuit.

Seaman versus Dee.

An Indebitat' Assumpsit, as Executor of S. was brought against the Defendant by the Plaintiff, as an Attorney of this Court by Original.

The Defendant pleads four Judgments against him; One in an Action of Debt, (upon which the Question was) for Money borrowed by the Testator upon Interest, which Debt with the Interest, at the time of the Action brought, amounted to such a Sum, which was recovered against him: And pleads three Judgments besides, ultra quæ he had not to satisfy.

The Plaintiff Demurs, and after being divers times spoken to, the Court Resolved for the Plaintiff.

First, for that Hale said, No Action of Debt lies for the Interest of Money, tho' he which borrows it Promises to pay after the rate of 6 l. per Cent. for it; but it is to be recovered by Assumpsit in Damages. So where by Deed the party Covenants or Binds himself to pay the Principal with Interest, the Interest is not to be included with the Principal in an Action of Debt, but shall be turned into Damages, which the Jury is to measure to what the Interest amounts to, which is allowed to be done; tho' indeed the Statutes (which permit the taking of Interest) say,
That

That Usury is damned, and forbidden by the Law of God. And tho' it was Objected, That the Judgment is but Erroneous, and the Executor liable while Reversed; and it cannot be said, it was the Executor's fault to suffer it: For an Executor may plead a Judgment against him in Debt upon a simple Contract; tho' it could not have been recovered if he had pleaded to the Action, or without his voluntary Consent.

So that Hale said, That Debt upon a Simple Contract lies against an Executor, if he please; nay, it hath been Adjudged, that an Executor may retain for a Debt due to him from the Testator, upon a Simple Contract: But in this Case no Action lies by the Law, nor any admission of the Executor can make it good.

Secondly, It appears, that part of the Interest accrued after the Testator's death, which is the Executors proper Debt, being his own default to suffer the Interest to run on: Then the Action being brought, both for that which is due in the Testator's time, and for that which grew due since, is manifestly Erroneous; and there is nothing in the Defendants Plea to take away the Intendment, that he had Assets to satisfy at the Testator's death.

To the Objection, That the Plaintiff once had abated his Writ; for that he declares by Privilege, as an Attorney of the Court.

It was Answered, That the alleging of his Profession and Privilege in the Declaration, was Surplusage and an impertinent flourish, and that being rejected the Declaration is sufficient upon the Writ; and an Attorney is at election to sue, either by Original, or by Privilege. Wherefore the Rule was, that the Plaintiff should have his Judgment.

The Lady Anne Fry's Case.

In an Ejectment by Williams, Lessee of George Porter Esquire, against the Lady Anne Fry. The Case appeared to be this, upon a Special Verdict.

That Mountjoy, Earl of Newport was seised of an House called Newport House, in the County of Middlesex, and had three Sons, who are yet living, and had two Daughters. Isabel married to the Earl of Banbury, by whom she had Issue Anne the Defendant; and Anne married to Porter, by whom she had Issue George Porter Lessee of the Plaintiff, and made his Will in this manner:

I give and bequeath to my Dear Wife, the Lady Anne, Countess of Newport, all that my House called *Newport House*, and all other my Lands, &c. in the County of *Middlesex*, for her Life; and after her Death I give and bequeath the Premises to my Grandchild

Anne

Anne Knolles (viz. the Defendant) and the Heirs of her Body: Provided always, and upon Condition, that she Marries with the Consent of my said Wife, and the Earl of *Warwick*, and the Earl of *Manchester*, or the major part of them: And in case she Marries without such Consent, or happen to dye without Issue, then I give and bequeath it to *George Porter*, (viz. the Lessor of the Plaintiff.)

The Earl of *Newpott* dies, and the Lady *Anne Knolles* being of the Age of 14 years, marries with *Fry* without the Consent of her Grandmother, or either of the Earls; and it was found, that she had no Notice of the Will until after the Marriage, and that *George Porter* at that time was of the Age of 8 years; and that after the Death of the Countess she Entred, and *George Porter* Entred upon her, and made the Lease to the Plaintiff.

This Case having been twice Argued at the Bar, (viz.) in Michaelmas Term, by Sir *William Jones* for the Plaintiff, and *Winnington* for the Defendant: And in Hilary Term last, by *Finch*, Attorney General, for the Plaintiff; and Sir *Francis North*, Solicitor General, for the Defendant.

It was this Term Resolved by the Court, (viz.) *Hale*, *Twisden* and *Rainsford*, (*Moreton* being absent) for the Plaintiff, upon these Reasons.

Rainsford. Here have been three Questions made.

First, Whether the words in the Will, whereby the marriage of the Defendant is restrained, make a Condition or Limitation: If a Condition, then none but the Heir can Enter for the Breach. But 'tis clear, that they must be taken as a Limitation, to support the intent of the Devisor, and to let in the Remainder which he limits over, 1 *Rolls* 411.

Secondly, Whether the Infancy of the Defendant shall excuse her in this Breach, and clearly it cannot: For a Condition in Deed obliges Infants as much as others, 8 *Co.* 42. *Whittingham's Case*, the difference between Conditions in Fact and Conditions in Law. Especially in this Case, the nature of the Condition shewing it to be therefore imposed upon her, because she was an Infant.

Thirdly, (and the main Point of the Case,) Whether the want of Notice shall make the Forfeiture of the Estate? As to that, Let the Rules of Law concerning Notice be considered.

First, I take a difference where the Devisee, who is to perform the Condition, is Heir at Law; and where a Stranger. The Heir must have Notice, because he having a Title by Descent, need not take notice of any Will, unless it be signified to him. And so is *Fraunce's Case*, 8 *Co.* Where the Heir was Devisee for 60 years, upon Condition not to disturb the Executor in removing the Goods;

Goods; and Resolved that he should not lose his Estate upon a Disturbance, before he had Notice of the Will. But where the Devisee is not Heir, (as in this Case) he must inform himself of the Estate devised to him, and upon what terms.

Another Rule is, When one of the Parties is more privy than the other, Notice must be given; but where the Privy is equal, Notice must be taken by the party concerned. A Bargainee shall not Enter for a Condition broken, before Notice, for the Bargain and Sale lies in his Cognizance, and not the Lessee. So if a Lease be made to commence after the end of the former; if the first be surrendered, the Lessor shall not Enter for a Condition broken for Non payment of Rent, until Notice given of the Surrender, 3 Leon. 95. And therefore there shall be no Lapse to the Ordinary upon a Resignation, without Notice. If a man makes a Feoffment, upon Condition to Enter upon payment of such a Sum at a place certain, he must give Notice to the Feoffee when he will tender the Money, Co. Lit. 211. a. Dyer 354. And upon this Reason is Molineux's Case, 2 Cro. 144. where a Devise was, that his Heir should pay such Rents, and if he made default, then his Executors should have the Lands, paying the said Rents; and if they failed of Payment, then he devised the Land to his younger Children, to whom the Rents were to be paid. It was Resolved, Non-payment by the Executors should be no Breach, until they had Notice that the Heir had failed, which was a thing that the younger Children must be privy to. But in 22 E. 4. 27, 28. Tenant for Life Lets for years, and dies; the Lessee must remove in convenient time, to be reckoned from the death of the Tenant, whether he had Notice of it or no: for he in Reversion is presumed to be no more privy to it than himself. So Gymlert and Sands's Case, 3 Cro. 391. and 1 Rolls 856. where Baron and Feme were Tenants for Life, Remainder to the Son in tail, Remainder to the right Heirs of the Baron; the Baron makes a Feoffment with Warranty and dies, then the Feme and Son joyn in a Feoffment; this is a forfeiture of the Estate of F. tho' he had no Notice of the Feoffment or Warranty, whereby the Right of the Son was bound. So Spring and Caesar's Case, 1 Rolls 469. A. and B. joyn in a Fine, to the use of A. in fee, if B. doth not pay 10 l. to A. before Michaelmas; and if he doth, then to the use of A. for Life, Remainder to B. B. dies before Michaelmas, the Heir of B. is bound to pay the 10 l. without any Notice given by A. The Reason given (which comes home to our Case) is, For that none is bound to give Notice, and then it must be taken; tho' indeed a second be added, For that B. (from whom his Heir derives) had Notice. The Mayor and Commonalty of London against Atford, 1 Cro. where a Devise was to six Persons, to pay certain Sums for the Maintenance of an Almshouse, &c. and if through Obliviousness, or other

Cause, the Trusts were not performed, then to J. S. upon the same Condition; and if he failed by two Months, then to the Mayor and Commonalty of London upon the same Trusts. The Sir did not perform the Trusts, J. S. enters, J. N. enters upon him, and a Fine with Proclamations was levied, and five years passed; and the better Opinion was, that the Mayor and Commonalty of London were bound to pay the Money appointed by the Will, altho' they had no Notice that the Sir persons of J. S. had failed; tho' indeed the Case is adjudged against them, as being barred by the Fine and Non-claim. Sir Andrew Corber's Case, 4 Co. is very strong to this purpose; where a Devise is to J. S. until he shall or may raise such a Sum out of the Profits of the Land: If a Stranger Enters after the death of the Devisor, tho' the Devisee had no Notice of the Will, yet the time shall run on, as much as if he had the Land in his own possession.

These Rules being applied to the present Case, it will appear no Notice is to be given:

First, The Defendant is as party to the Will as any one else, (viz.) as George Porter, who is found also to be an Infant. It is not found whether there were any Executors, if it had, they were not concerned to give Notice, nor did it import the Heir: For he could have neither benefit or loss by the Condition.

The Two Cases which have been chiefly relied upon for the Defendant, were, first, France's Case, which differs, because it was in case of an Heir. Secondly, the Case of Sanders and Carwell, 8 Jac. in a private Report of Sir Geoffrey Palmer, the Attorney General, in which there is no clear account of the Case, and we cannot find the Roll: It was a Devise to his Wife for life, Remainder to his Daughter in tail, upon Condition to pay Money; and it was held that the Non-payment would be no breach unless she had Notice.

First, It was an Opinion only upon Evidence, and Lea and Chamberlain only in Court.

Secondly, For ought appears the Daughter might be Heir, and then 'tis good Law.

Thirdly, It appears there was a foul Concealment of the Will for four years time; within which time (for ought appears) the Condition was to have been performed.

Twisden was of the same Opinion; but I omit his Argument, because I could not hear him perfectly.

Hale was of the same Opinion: As to the first Point, I shall discharge the Case of it, as not fit to be called in question: For without peradventure tho' the word Condition be used, yet limiting a Remainder over, makes it a Limitation; for so 'tis plain the Testator meant, and 'tis as much as if he had said, And if she Marries, &c. then to remain, without the word Condition.

And

And this hath received as many Resolutions as ever any Point did, (viz.) Wiseman and Baldwin's Case, 18 Eliz. 1 Rolls 412. Hainf 2 Leon. 51. worth and Pretty, 3 Cro 833. and 2 Cro. Pells and Browne's Case, Owen 412. with a great many more; and nothing but the Opinion in Mary 1 Leon. 383: Portington's Case, 10 Co. against it.

When Fynch, Attorney General, Argued this Case, he observed that Coke himself was of another Opinion in the 3d Report, in Wellock and Hammond's Case, cited in Boraston's Case: For tho' there 'tis the word Paying only, which is adjudged a Limitation; yet Coke saith, the Quare in Dyer 317. is upon that well Resolved, and the Case in Dyer is upon the word Condition expressly.

Then to proceed to the other Matters. Here is an Estate Tail devised to the Defendant, subject to Two Limitations, the one of Law, (viz.) Dying without Issue; the other express and in fact, (viz.) Marrying without the consent, &c. and both are coupled together, so that whenever she Marries without Consent, &c. her Estate determines and is transferred to him in Remainder, without either Entry or Claim. 'Tis all one as if the Estate had been devised to her for Life, and if she Marries, then to remain, which had been but an Estate quamdiu sola vixerit: And it is to be observed, that if her Marriage here be no breach of the Conditional Limitation (for so 'tis properly called) because she had no Notice, then it can never be broken: So that the Question must be, Whether such a Marriage shall discharge the Estate of it, and make it become absolute.

'Tis true, where the Condition requires such an Act to be done, as may be done after Notice, it hath been questioned, whether the Law shall not protract the Time limited for performance, until Notice be had, 1 Cro. Alford's Case, which was a Condition for Payment of Money: But this is a thing of that nature, that being done, no subsequent Notice can ever retrieve.

Then 'tis to Enquire, How far the want of Notice will excuse? It must be considered, that 'tis a Will made by a person now dead, who can give no Notice, neither can any come to the knowledge of it without Enquiry, and one hath the same means to obtain it with another; and the person who would take advantage of it, must make the best Enquiry he can. If a Devise were made to the Defendant, it was her Concern to Enquire upon what terms; until then how can it be ascertained, whether she will take it? And so it was Porter's Business to Enquire; no difference between them in this respect. So that upon these five Accounts, it will appear, that no Notice is requisite to be given in this Case:

First, Because the Testator hath not appointed any Notice to be given, than he which was the Disposer might give upon what terms he pleased; and this Matter of Notice shall not be added, unless it were in a Case wherein the Law would very strongly require it.

Secondly, Because there is no Person who can reasonably be engaged to give Notice (viz.) not the Heir, for he is Disinherited; not the Executors, for they are not concerned in the Freehold; nor the Trustees, for they have but their labour for their patus; nor Porter, for he is no more bound to give than he to take Notice?

Thirdly, Because each Party have the same means of Informing themselves of the Will, (i.e.) by Enquiry.

Fourthly, It more imported the Defendant to know it, as relating to her own Interest; the Will which gives the Estate, gives it upon this Conditional Limitation. Corbet's Case, 4 Co. comes very close; where, if the Devisee stays while the time wherein the Money might be raised is elapsed, he shall never raise it after. Suppose a man dies possessed of a Term upon which a great Rent is reserved; shall the Executor, after that he hath proved the Will throw up the Term, as pretending not to have known of it? An Estate is devised to one durante Viduitate; shall she marry, and because she had no Notice of the Will, hold the Estate absolutely for her Life? There is the same Reason in this Case; for this Proviso is a part of the Limitation of the Estate it self. No man is presumed to be ignorant of his own Interest; and as he must take Notice to acquire, so of the manner of the Estate he gains. He that gave it thus, was not obliged to do so much.

Fifthly, It was not impossible for the Defendant to have made Enquiry, and she must not take advantage of her Laches. A Bond with Condition to pay 50 l. when the Obligees shall marry the Obligor's Kinswoman; in Debt upon this, it was Resolved, that the Obligees was not bound to give Notice of the Marriage, tho' it lay in his own privacy; because the Obligor might have known it by other means. Hill. 1650. Between Try and . . . Rot. 1081. B.R. It was proper for the Defendant to have Enquired, whether her Grandfather gave her any thing: And so it was for him that should marry her. Harwood's Case Adjudged here (Hill. ult.) was upon this Reason: He married a City Orphan in Kent, and was fined by the Court of Orphans, because he had not first applied himself to them for their Licence, &c. according to the Custom of the City: And the Fine was Resolved here to be well imposed, tho' he had no Notice that she whom he married was an Orphan; because it was his business to enquire of the Condition of her whom he will make his Wife,

Ante.

Then

Then the next thing to be considered is the Infancy of the Defendant, and that is nothing in this Case. Porter who was the probablest person to give notice is found to be an Infant too. Conditions in fact bind Infants. Again, the Condition here relates to an Act, which he is capable of doing. The Statute of Merton which Enacts, Non currant usura, &c. whereby Infants are exempted from Penalties; yet in another Chapter gives the Forfeiture of the said double value to the Lord where his Ward Marries without his consent. 'Tis a restraint laid upon her in a matter proper for her Condition, and with respect to her Condition, that being an Infant, she might advise with her Friends about her Marriage. The Cases which have been objected do not come to this Case, as the Opinion in Sanders and Carwells Case, which might be good Law, if it could be known what that case was, for the words might either explicitly or implicitly require notice, as if they were, if he refused to pay, &c. or it may be no time might be set for payment; say in Molingux Case, there Rents were granted, and after a Devise for the payment of them which naturally lie in demand.

Secondly, There it concerned the younger Children to give notice; for the Rents were not only to be paid to them, but upon failure of payment the Land was Devised to them; So that was a Concurrence of concern in them, as to the performance of the Condition, and the Estate they should acquire by the Breach. Whereas the Plaintiff in this Case, is not concerned in the performance of the Condition.

Thirdly, The penning of the Condition there quite differs; for 'tis upon default of payment, which implies notice must be first had. In Frances Case, there would have been no need of notice, if the Devise had not been to the Heir, which is the only thing wherein it differs materially from this Case. In Alford's Case, the debate was occasioned by the special penning; for it was thus, that if thorough Obliviousness, the Trusts should not happen to be performed. Now there could be no Oblivion of that they never knew; therefore there is some Opinion there, that the Mayor and Citizens of L. ought to have had a precedent notice; yet the Judgment is contrary, for they could not have been barred by the Fine and Non-claim, if notice had been necessary to the Commencement of their Title; and 'tis not found, whether those to whom the Estate was devised, before had notice; so that this cause proves rather, that there needs no notice in this case, than otherwise. Wherefore the Plaintiff must have his Judgment.

When my Lord Chief Justice had concluded, Rainsford said; he had spoken with Justice Moreton, who declared to him, that he was of the same Opinion.

Fitzgerald *versus* Marshall.

ERror of a Judgment given in the Kings Bench in Ireland, in affirmance of a Judgment removed thither by Error out of the Common Pleas in Ireland.

By the Record it appeared, that the Writ of Error to the Common Bench was directed Rob. Booth, Militi & Socijs suis, quia in Recordo & processu ac in redditione Judicij loquelæ quæ suit coram vobis & Socijs vestris. And the Judgment certified appeared to be in an Action, commenced in the time of Sir R. Smith who died, and Sir R. Booth made Chief Justice in his place before Judgment given. And the Court here were of Opinion, that the Record was not well removed into the Kings Bench there, by that Writ, which commanded them to remove Recordum loquelæ coram R. Booth; whereas the loquela commenced before R. Smith, and the Titling of the Record is in such case placita coram R. Smith, &c. tho' some of the Continuances might be entered coram R. Booth, and the Judgment given in his time, and for this Cause, the Judgment given in affirmance in the Kings Bench there was reversed.

Sir Samuel Sterling *versus* Turner.

ERror of a Judgment in the Common Bench, in an Action upon the Case, where the Plaintiff declared upon the Custom of London, of Electing of two Men in the Office of Bridge-masters, every year by the Citizens assembled in a Common Hall; and a Custom that if two be Competitors, he that is chosen by the greatest number of Votes is duely Elected, and that if one in such case desire the Polls to be numbred, the Mayor ought to grant the Poll. And shews that there was a Common Hall assembled, the 18 of October 22. Regis nunc. Sterling being Mayor, and that then the Plaintiff and one Aller stood as Competitors to be chosen to that Office, and avers, that he had the greatest number of Voices, and that he affirmed then and there, that he had the greatest number, which the other denying, he requested the Mayor, that according to the Custom they might go to the Poll; and the Defendant not minding the Execution of his Office, but violating the Law and Custom of the City, then and there did maliciously refuse the numbering of the Polls, but immediately made Proclamation, and dismissed the Court, by which he lost the Fees and Profits of the Place, which he averred belonged unto it.

Upon Not guilty pleaded, and Verdict for the Plaintiff after it had been several times argued in Arrest of Judgment, that this Action did not lie, it was adjudged for the Plaintiff, by Tyrrel, Archer and Wyld: Vaughan dissenting. And now Error was brought
and

and assigned in the matter of Law, and argued for that it was uncertain, whether the Plaintiff should have been Elected; and that he could not bring an Action for a possibility of damage, and this was no more, not being decided who had the greatest number of Voices.

But the Court were clear of Opinion, that the Judgment should be affirmed; for the Defendant deprived the Plaintiff of the means, whereby it should appear, whether he had the greatest number of Electors or no. And Hale said, it was a very good President, and so it was adjudged by both Courts.

One D. of Bedfordshire Esquire, was indicted of High Treason, for copying a great number of counterfeit pieces of Guinies of Gold²³ Regis nunc, and being Arraigned at the Bar, he pleaded the Kings Pardon; which was of all Treasons, and of this in particular, but did not mention that he stood indicted.

Twisden said, that my Lord Keeling was of Opinion, that such a Pardon was not good. But Hale said, it might be well enough in this case, but in case of Murder it is necessary to recite it, because of the Statute of 27 E. 3. 2. (vid. 10 E. 3. 2. 14 E. 3. 15.) and so it was allowed.

The Lady Chesters Case.

A Prohibition was prayed to the Prerogative Court of Canterbury. Sir Henry Wood having devised the Guardianship of his Daughter by his Will in Writing, according to the Act of this King, to the Lady Chester his Sister, the Dutches of Cleaveland, to whose Son this Daughter being about 8 years old was contracted, pretending that Sir Henry Wood by word revoked this disposition of the Guardianship, sued in the Prerogative Court, to have this nuncupative Codicil proved; and the Court granted a Prohibition, for they are not to prove a Will concerning the Guardianship of a Child, which is a thing consutable here, and to be judged whether it be devised pursuant to the Statute. And Hale said, that they may prove a Will which contains Goods and Lands, tho' formerly a Prohibition used to go quoad the Lands. Vid. 1 Cro. Netter and Percivalls Case.

Prior versus

Error was brought of a Judgment in this Court into the Exchequer Chamber, and Error in fact was then assigned; and the Court being there of Opinion, that Error in fact could not be assigned there, they affirmed the Judgment; upon which the Record with the Affirmation was remitted hither, and a Writ of Error was brought

brought here, coram vobis residen' (as is usual for Error in fact.) It was pray'd, that upon putting in not Bail, this new Writ of Error might be a Superedeas to the Execution. But the Court held, that this Writ was not to be allowed in this case, for the Judgment given in this Court, being affirmed in the Exchequer Chamber, transit in rem judicatam there, and a Writ of Error cannot be brought here upon a Judgment there; and 'tis always the course in Writs of Error to recite all the proceedings that have been in the matter; as if a Judgment be removed hither, by Error out of the Common Pleas, and here affirmed, and then brought into Parliament, the last Writ must recite both the Judgment in Communi Banco, and the Affirmation here. And whereas this Writ goes by the Judgment into the Exchequer Chamber, and mentions only the Judgment here, it must therefore be quashed: And it is the course, if a Writ of Error be brought here, upon Error in fact of a Judgment here, that the Writ should be allowed in Court. And the Court said, they would allow none in this Case.

Throwers Case.

HE was indicted at the Sessions of the Peace at Ipswich for Stopping communem viam pedestrem ad Ecclesiam de Witby. It was removed hither by Certiorari, and the Court were moved to quash it, for it was objected, That an Indictment would not lye for a Nusans in a Church-path; but Suit might be in the Ecclesiastical Court. Besides the Damage is private, and concerns only the Parishioners. Where there is a foot way to a Common, every Commoner may bring his Action if it be stopped, but in such case there can be no Indictment.

Hale said, if this were alledged to be communis via pedestris ad Ecclesiam pro parochianis, the Indictment would not be good, for then the Nusans would extend no further than the Parishioners, for which they have their particular Suits; but for ought appears this is a common foot way, and the Church is only the Terminus ad quem, and it may lead further; the Church being expressed only to ascertain it, and 'tis laid ad commune nocumentum; wherefore the Rule was, that he should plead to it.

The Lady Prettymans Case.

A Judgment was had in a Scire facias brought against her upon a former Judgment, upon two Nihils returned. And the Court was moved to set it aside, for that it was alledged; that before the Scire facias brought she was married to Sir John Prettyman, and that it was brought against her as sole, by contrivance between the Plaintiff and her Husband to oppress her, and lay her up

up in Prison; and it was shewn that the Plaintiff knew of the Marriage, for he (being an Attorney) had prosecuted an other Action before the return of the Scire facias against her and her Husband, and that he could not help her self by Error, or Audita Querela, because her Husband would Release.

The Court said, they might set aside the Judgment, for the misdemeanour of the Plaintiff; but because they were informed, that this Marriage was under debate in the Ecclesiastical Court, and near to a Sentence, they suspended making any Rule in this, while that was determined.

Twisden said, he had a Case from my Lord Keeling, where a Feme Covert Infant levied a Fine, and her Friends got a VVrit of Error in her Husbonds and her name, that the Court would not suffer the Husband to Release. But Hale said, he could not see how that could be avoided; but he had known, that in such case the Court would not permit the Husband to disavow the Guardian, which they admitted for the VVife.

How's Case.

HE was indicted of an Assault, Battery and VVounding of Thomas Masters Esquire, and Found Guilty at the Assizes in Gloucestershire. Now the Attorney General moved the Court to set a Fine, and such an one as might be exemplary, according to the demerit of the Fact; for he shewed, that a great part of the Gentry of Gloucester, amongst which were How and Masters, being assembled at Cirencester, about the Election of a Burgeis for that Town; How, without any provocation, struck Masters on the Cheek with the end of his Cane, which had an Iron pike at it; and that if Masters had not governed himself with much moderation and prudence, it had in all probability engaged the whole Assembly in a dangerous quarrel, they being both Men of great Estates and Quality in the Country. And the Attorney said, there was nothing more necessary than that somewhat of a limited Searchamber should be exercised in this Court, for the due punishment of such enormous Crimes as these.

Hale said, that they were much discouraged from setting Fines, for the new Act binds them to estreat them into the Exchequer; and then it was well known whether they went, (meaning to such as farmed them from the King by Patent.) The Attorney replied, that the legality of such Patents was to be questioned; and that one which was granted to the Earl of Berkshire, was now like to be resumed, and it was fit it should, seeing it was like to prove an obstruction to the publick Justice.

7 Co.Penal
Statutes.

Then it was doubted, whether the Fine could be set, How not being present; but held it might, but the Court is not to hear any thing moved in mitigation of the Fine, unless the Party be present, and he was fined 500 Marks.

Ward *versus* Forth.

In Debt upon a Bond, the Defendant pleads, that he delivered the Deed as an Escrow to J. S. &c. & hoc paratus est verificare.

To this it was demurred. For that he ought to have concluded, & issint ninet son fait, for this matter amounts to a Special Non est factum; and the Plaintiff cannot reply, that he delivered it as his Deed absque hoc, that he delivered it as an Escrow, and so said the Court.

Shermans Case.

By Certiorari, an Order for the keeping of a Bastard Child by the Justices of the Peace, in pursuance of the Statute of 18 Eliz. was removed into this Court, which was excepted to.

First, For that they had appointed the Father to allow 4 s. to the Midwife; whereas it did not appear, that the Parish had procured her, or that they were chargeable with it.

Secondly, For that they ordered 7 s. a week, to be allowed for the Nursing Cloaths, &c. of the Child, until it should be able to get its living by working; which was said to be excessive in the Sum, and uncertain for the time, for it should have been for so long time as it shall be chargeable to the Parish.

Hale said, that they could make no allowance to the Midwife, unless in discharge of the Parish.

Twissden said, that they could not order the 7 s. a week to be paid, until it should be able to get its living, for perhaps the Father would take it away and maintain it himself, which he may do if he please; but that the Order might be quashed without more delay, and the matter remanded to further Examination. Sherman consented to pay all the Arrears of the 7 s. a week, and the Costs that had been expended in Maintenance of this Order, or what more should be laid out, in case he should be again found the reputed Father of the Child, for he said it was imposed upon him by Combination, whereupon it was quashed.

Sir

Sir Ralph Bovy's Case.

AN Action was brought upon an Escape, for that he being Sheriff of Surry, voluntarily suffered J. S. whom he had in Execution, to escape.

He pleads, that he made fresh pursuit and took him again, and doth not Traverse the voluntary Escape, to which it was demurred. Et Adjournatur.

Anonymus.

A Scire facias against the Conuzee of a Statute, who had extended, supposing that he was satisfied. He pleads, that before the Scire facias brought he had assigned over all his interest, and prays Judgment of the Writ.

Hale said, that the VVrit was good, seeing he was a Party to the Record; the Plaintiff need not take notice of the Assignee unless he please, and if there be part of the Debt unsatisfied, that is to be tendered to the Conuzee.

In a VVrit of Disceit, to reverse a Fine of Land in antient Demesne; after Assignment the Conuzee shall be made party. So in a VVrit of Error, tho the Terratenant shall not be turned out of possession without a Scire facias.

Dionise versus Curtis.

TRover de duabus Centenis Plumbi uræ, Anglicè two hundred weight of Lead Ore.

It was objected, that Centena signifies an hundred in a County, and 'tis uncertain here of what it should be understood; but the Court said it was good with the Anglicè, and to be understood by the subject matter. Trover de duobus ponderibus casei, Anglicè, two weigh of Cheese, hath been held good. So de duobus oneribus Cupri, Anglicè, two Horse loads of Copper.

Evans, &c.

IN an Action upon the Case, whereas he pretended Title to certain Goods in the Custody of one Susan Pricket, and claimed them to be his own, intending to remove them; the Defendant in Consideration, that he would suffer them to continue there, assumed to see them forth coming, and that they should not be imbezelled, but safely kept to the use of the Plaintiff, and shews that afterwards the Goods were Eloigned, &c.

Upon Non Assumpsit and Verdict for the Plaintiff, it was moved to stay Judgment; that it doth not appear, that the property of these Goods was in the Plaintiff, for it is alledged only, that he pretended to them, and claimed them to be his own: Sed non Allocatur.

For the Declaration is full enough, at least must be intended he proved they were his own, or the Jury would not have found for him.

Anonymus.

In Debt upon a Record in an inferiour Court, upon Nul Tiel Record pleaded, they shall certifie only tenorem Recordi, and grant Execution afterwards.

Hals said, that he had seen a Certiorari to certifie tenorem Recordi, upon a Tryal at Bar concerning the Toll of Uxbridge, the Town pretending to be incorporated, and to have a right to the Toll; and it was resolved, that no Bugh holder could be a Witness for the Town.

Termino Sanctæ Trinitatis, Anno 24 Car. II.

In Banco Regis.

Mekins versus Minshaw.

A Prohibition was prayed to the Court of the Chamberlain of Chester, where an English Bill was preferred, setting forth, that J. S. being Indebted to the Plaintiff, the Defendant upon good Consideration promised, That if J. S. did not pay it, he would; and that he wanted such precise Proof of the Promise as the Law required. Wherefore he prayed to be relieved by the Equity of the Court.

The Defendant confessed the Promise in his Answer, and alledged further, That he had paid the Money. And a Prohibition was granted; for the Plaintiff had now obtained the end of his Suit, and might have remedy at Law upon the Evidence of the Defendants Answer.

Anonymus.

Anonymus.

An Action was brought for these words: The Defendant said of the Plaintiff, That he had picked his Pocket against his Will; and at the same time de ulteriori malitia said, He was a Pick-pocket.

The Defendant Justified, but in such manner as it was Ruled against him.

Then he moved to stay Judgment upon the Insufficiency of the Declaration: And the Court were of Opinion that the Words were not Actionable, as carrying with them no necessary implication of Felony, and might mean only Trespas. And Hale said, He would not improve Actions for Words further than they are.

Fortescue versus Holt.

A Scire facias was brought upon a Judgment of 1000 l. as Administrator of J.S.

The Defendant pleaded, That before the Administration committed to the Plaintiff, (viz.) such a day, &c. Administration was granted to J.N. who is still alive at D. And demanded Judgment of the Writ.

The Plaintiff Replies, J. N. died, &c. & de hoc ponit se super Patriam. And to that the Defendant Demurs.

For that he ought to have Traversed absque hoc, that he was alive: For tho' the Matter contradicts, yet an apt Issue is not formed without an Affirmative and a Negative; and so said the Court. And also that the Defendants Plea was bad, being Concluded in Abatement; whereas it goes in Bar, which was so palpable, as made it evident to be used only for delay. Which Hale observing, he did exceedingly blame the bad Practice that is amongst Counsel in advising such Pleas, and said it was within the Penalty of Westm. 1. Serjeants Counters, &c. and said, Tho' Counsel were obliged to be faithful to their Clients; yet not to manage their Causes in such a manner, as Justice should be delayed, or Truth suppressed; to promote which was as much the Duty of their Calling, as it was the Office of the Judges, tho' not in so Eminent a Degree.

In this Case it was doubted, Whether Judgment final should be given, or a Respondeas Ouster: But because the Plaintiff said, he would be content with the latter, that was not Resolved.

Anonymus.

Anonymus.

In Trespas Quare clausum fregit, 'tis a Plea in Abatement to say, That the Plaintiff is Tenant in Common with another: But cannot be given in Evidence upon Not Guilty, as it may where one Tenant in Common brings Trespas against the other.

Peters *versus* Opie.

The Case was moved again, and Hale held clearly, that the Promise being pro labore (tho' there was also a Counter-Promise) did carry in it a Condition precedent, (viz.) That the work should be done first. And he said, that in Cases tried before him, where the Declaration was upon Reciprocal Promises, if it appeared upon the Evidence, that the Intention was, that the Plaintiffs part was to be performed before the Defendants; he directed against the Plaintiff, and would not have the Defendant given to his Cross Action.

Twisden strongly to the contrary. Pro labore (says he) is no more than would have been implied if those Words had been omitted; then 'tis within the Case of Reciprocal Promises. The Case cited in Ughtred's Case, 7 Co. A. Covenants to B. to serve him in the Wars, B. Covenants to pay him so much for it; an Action lies for the Money without averment of the Service done, because of the mutual Remedy.

Hale was now of Opinion, that the Plaintiffs saying, parat' fuit & obtulit to do the Work; tho' he did not say, and the other refused, yet it was a sufficient Averment after a Verdict. The Case of Vivian and Shipping, 3 Cro. 384. in an Assumpsit upon a Promise to perform an Award, the Plaintiff said licet He had performed all on his part, &c. which tho' no good Averment in form, yet held it aided by the Verdict.

Wherefore tho' they could not agree in the other matter, yet Judgment was given for the Plaintiff. Ante.

King *versus* Melling.

In an Ejectment, the Case was thus found in a Special Verdict.

John Melling was seised in Fee, and had Issue Barnard and John, and by his Will in Writing devised to Barnard for and during his Natural life, and after his decease to such Issue as he should have of the Body of his second Wife, (his first then being alive); and if no such Issue hapned, then to John Melling, provided that Barnard might make a Joynture to his Wife, which

she should enjoy for her Life. The Devisor dies, Barnard suffers a Recovery to the use of himself in Fee, and after Covenanted to stand seised to the use of his Wife for her Joynture for Life, and died without Issue by any second Wife. The Question was, Whether the Wife had a good Estate, or that J. Melling in Remainder had the Right?

It was Argued for John Melling; First, That Barnard Melling had only an Estate for Life by this Devise. Indeed, if it had been to him and his Issue which he should have by the second Wife, that would have been an Entail; but here 'tis expressly given to him for his Life. The Case of Wiat Wield, 8 Co. 78. b. is full to this: A Devise to a man and his Children is an Estate Tail, if he hath none at the time: But if the Devise were to a man for his Life, and after his Decease to his Children: there, whether he had Children or no at the time, they take by way of Remainder either contingent or vested: So Archer's Case, 1 Co. 1 Rolls 837. A Devise to his Son for Life, the Remainder to the Sons of his Body lawfully begotten; the Son takes only an Estate for Life, because so expressly limited. Then the Recovery destroys this Contingent Remainder, and so also the power of appointing a Joynture to his Wife: for 'tis not a bare Collateral Power, but annexed to his Estate, and therefore extinguishes in the Conveyance of it.

But admitting it were still in him, yet he did not well execute it, which should have been in such manner as it might have taken effect by the Will, and not to arise upon a Covenant to stand seised.

On the other side it was Argued, that it was an Estate Tail in Barnard Melling, and no Remainder contingent to the Issue: for there a Remainder is said to be contingent where the first Estate may fail before 'tis ascertained whether the Contingent will happen or no; here if it be an Entail, Barnard Melling hath it for his Life, and the Issue had nothing until after his decease. So 'tis but an Expressio eorum quæ tacite insunt.

Again, The Power remains notwithstanding the Recovery; for 'tis collateral to the Estate. If Executors have Authority to make a Feoffment for the payment of the Testator's Debts, if they should first make a Feoffment to another purpose, this would not determine their Power, but they might afterwards execute it in performance of the Will, 1 Co. in Albany's Case.

Hale. It seems very strong upon Wield's Case, that Barnard Melling hath but an Estate for Life, (if it were devised to him,) and after his decease to his Issue, I should think that to be an Estate Tail; but here the express Words are for his Life. A Devise to one for his Life, and after his decease to his Heir, that hath been held a Fee; for Heir is nomen Collectivum. But Archer's Case,

1 Co. is a Devise to A. for his Life, and after to his Heir, and the Heirs of that Heir; there because the words of limitation were put to the Heir, therefore Heirs was taken to be but designatio personæ, and Resolved he should take by Purchase. Vid. Anderson 110. Construction must be according to the express words of the Will. A Devise to Two, equally to be divided between them, and to the Survivor of them, makes a Joyntenancy upon the express import of the last Words.

Twisden. A Devise to one for Life in perpetuity, makes but an Estate for Life only, 15 H.7.

Hale. 'Tis considerable also, that he adds a Power to make a Joynture, which would have been useless if he had intended him in an Estate Tail: And this Power is in the nature of an Emolument annexed to his Estate, which seems to be destroyed by the Recovery, neither hath he well executed his Power; for after the Recovery he became seised in Fee, so the Covenant to stand seised may work upon that Estate, and so shall not be taken in pursuance of his Authority, which possibly it might have been if he had but an Estate for Life; for without reference to that, it would have been ineffectual; & quando non valet quod ago, ut ago valeat quantum valere potest. And this is agreeable to the Learning in Sir Edward Clere's Case in the 6 Co.

The Court seemed pretty clear in these Points; but because it was upon the first Argument, they gave leave to the parties to speak to it again, if they thought fit. Er Adjournatur. Post.

Goffe's Case.

A Trial at Bar was had upon an Indictment of Murder. The Case appeared to be this:

Goffe (being a Collector of the King's Dury of Chimney-Mony) came with a Constable to the House of one West in Southwark, to demand Mony due upon that account, and entred the House, there being only a Maid-Servant at home; who telling them, That her Master was from home, and that she could not tell where to find him, or come at any Mony to pay them. They presently distrained a Silver Cup which stood by: The Maid thinking to prevent the carrying of it away, stands against the Door where they were to have gone out, and Goffe took her by the Arm and beat her Head and Back against the Door Post divers times, of which she died within three Weeks after.

The Court were of Opinion, that this was but Homicide, and directed the Jury to find it so; for hindring their Passage out, to go away with the Distress, was a Provocation. And 'twas found accordingly.

Meredith's

Meredith's Case.

Error of a Judgment given in the King's Bench in Ireland, where Robert Meredith was Plaintiff, and that Judgment was Entered, *Quod prædict' Carolus Meredith recuperet.*

And the Court held it amendable, as the Default of the Clerk; tho' in the Judgment (the Misprision being only in the Name, which was right in the rest of the Record that was before the Clerk, and should have directed him.)

Sir Ralph Bovy's Case.

In Debe upon an Escape, the Plaintiff sets forth in his Declaration a Voluntary Escape.

The Defendant protesting that he did not let him Voluntarily escape, pleads, That he took him upon Fresh pursuit. To which it was Demurred, because he did not traverse the Voluntary Escape, and Resolved for the Defendant: For it is impertinent for the Plaintiff to alledge it, and no ways necessary to his Action. 'Tis out of time to set it forth in the Declaration; but it should have come in the Replication. 'Tis like Leaping (as Hale Ch. Justice said) before one come to the stile: As if in Debe upon a Bond the Plaintiff should declare, That at the time of sealing and delivery of the Bond the Defendant was of full Age; and the Defendant should plead deins age, without traversing the Plaintiffs Allegation. Whiting and Sir G. Reynell's Case 657. in the 2 Cro. seems to be against it: But Harvey and Sir Geo. Reynell 2 Car. in Latch, is Resolved, that no Traverse is to be taken.

Thomas versus Butler.

A Prohibition was prayed to the Ecclesiastical Court, where the Case was this:

Sir R. Ashton made his Will, and therein gave divers Legacies, and the residue of his Goods and Chattels (after his Debts and Legacies paid) he bequeathed to his Wife, and made three Executors and died, whereof one only proved the Will, and afterwards died intestate.

The Daughter of Sir R. Ashton procures Letters of Administration (the Wife uncalled) and about five years after the Lady Butler, the Relict of Sir R. Ashton, and residuary Legatee, sues to have them Repealed: And whether there should be any Prohibition to that Suit, the Court thought fit to Advise. For it was suggested, That there was not Assets to pay the Debts and Legacies, and so there could be no residuum. And Sir Walter Walker

Walker (a Doctor of the Civil Law) came to Inform the Court what had been their Course in such cases; and he affirmed, that the Law was positive, absque aliqua distinctione, Asserts or not Asserts, That Administration should be committed to the residuary Legatee. And so Dr. Denni declared in Eastwick and Standen's Case in Dyer. And in one Burton's Case (which goes also by the Name of Cotton's Case) 17 Jac. this Point was much Debated, where the next of Kin obtained Administration, the residuum being Devised to another, who afterwards got it Repealed; and the first Administrator appealed to the Delegates, who confirmed the Repeal. Where the Residuum is Devised, the Law judges those words tantamount to the making of him Executor, and it would be very inconvenient that that Allegation, That there is no *Residuum*, should be admitted; so that may be offered in every Case, and until that is tryed, Administration would not be granted, which might bring much Damage to the Estate of the testator. 'Tis also against a strong Presumption, (*viz.*) That every man leaves as much as will satisfy his Will. He said also, Seeing committing Administration was of the Cognizance of their Courts he conceived they were to determine all Matters concerning them; and cited the Register, where 'tis said, *Cognitio principalis trahit ad se accessorium*.

Here Hale interrupted him, and said, Since the Statutes had made Provision in those cases, they were to Expound them, and also to whom the Right of Administration appertain'd; and if the Ecclesiastical Court did not commit it accordingly, they use to prohibit them; and that the Court desired only to know from them, what their Usage had been. He also asked him, if it had been Pleaded in their Court, That there was no *Residuum*, what they would have done?

To this he Answered, That they should have received it as a Plea; but would have Overruled it as Insufficient: As was done in the Countess of Lincoln's Case, in 1655.

Dr. Masters contra. In this Case the Daughter was Legatee of an 100 l. In the case of the next of Kin, one may be preferred before another; so why not one Legatee before another? Qui prior est tempore potior est jure, in equali jure, they which first come, should be first served; and vigilantibus, non dormientibus jura subveniunt. For Burton's Case he said, That there the party to whom Administration was first granted, was no Legatee. So it was in the Countess of Lincoln's Case; neither was there a Sentence in that Case, but ended by Composition. In the Case between Blunt and Taylor, in 1670. where one Hall having made his Will, and made the Wife of Blunt Executrix, and Devised to her the Residuum: She proved the Will and died. Blunt Administers to her de bonis non of Hall; and the Grandchild of Hall (being next of

of Bin) cites Blunt to Repeal his Administration; and obtained a Repeal, which was confirmed upon an Appeal to the Delegates. But Sir William Wild denied the Case to be so; for he said, That the Administration was not Repealed; as unduly granted at first; but for a male Administration: For *Blunt* being Cited, denied either to pay the Legacy devised to the Grandchild, or bring in an Inventory, and the Case was Debated upon that Point only before the Delegates; and he said, That it was their course to Repeal an Administration, tho' granted to the next of Kin, in case of Abuse.

But Hale said, That therein they exceeded their Power, and a Prohibition ought to go, and that they ought to take sufficient Caution at first to prevent male Administration.

The Court strongly inclined, that no Prohibition ought to go in this Case; for the Reason that 21 H.8. requires, That Administration should be granted to the next of Kin was, upon the Presumption, That the Intestate intended to prefer him: But now the Presumption is here taken away, the Residuum being disposed of to another; and to what purpose should the next of Kin have it, when no benefit can accrue to him by it? and 'tis reasonable that he should have the management of the Estate, who is to have what remains of it, after the Debts and Legacies paid. And the Averment, That there is no *Residuum*, is not material; for being once out of the Statute, upon Construction of the Words of the Will, there is nothing *ex post facto*, can bring it within it. And there are certain Administrations which have been always Ruled to be out of the Statute, as Administrations during Minority, & *pendente lite*, which need not be granted to the next of Kin, and granting it to the Husband comes not within the Words of the Statute. But because in this case, Administration had been granted so long before the Residuary Legatee came in, and the Administrators by Decrees in Chancery had got in great part of the Estate, and still there were Suits depending there for obtaining of the rest, which were near their Effect; which would be abated and set aside if the Administration were now Repealed.

The Court proposed an Accommodation, as most useful to either of the Parties, and advantageous to the Estate; which was accepted.

The Civilians said, That a Legatee that had got Administration, tho' it were after Repealed upon a Citation, should yet retain for his Legacy. Otherwise upon an Appeal; for there the Administration is avoided *ab initio*. Vid. *Blackman's Case*, 6 Co.

Bedniff & Ux' *versus* Pople & Ux'.

A Prohibition was prayed to stay a Suit for Defamation in the Ecclesiastical Court for Words spoken to the Servant of the Plaintiff, (*viz.*) Go tell thy Mistress Whore, she is a Whore, and I will prove it. It was said, they were common Words of Brawling, and not importing any such Slander for which Suit could be there, 3 Cro. 393. Dimmock *versus* Fawcett, & 3 Cro. 456. Pewe and his Wife *versus* Jeffries.

Hale. These cannot be said to be Words of Heat, as if spoken when the Parties are Scolding together; but were uttered deliberately in the Parties absence to her Servant. Formerly they would Prohibit, unless the Words implied some Act to have been done: *Vid.* Eaton *versus* Ayllof, 3 Cro. 110. But 'tis Reason the Suit should proceed in this Case, seeing it is for matter of Slander, which is punished by publick Pennance. Therefore Suit lies in London for calling Whore; because by the Custom there, Whores are to be Carted.

Wherefore the Court denied a Prohibition.

Read versus Willmott.

In False Imprisonment, the Defendant Justified by a Capias, directed to him upon a Suit commenced against the Plaintiff in an Inferiour Court. To which the Plaintiff Demurred; because it was not shewn that a Summons was issued first, and Inferiour Courts can Award no Capias, but upon a Summons first Returned. To which it was Answered, That this being admitted, yet it is but an Erroneous Process, in the Execution of which the Officer is excused, who is not to be punished when the Court proceeds *inverso ordine*.

Hale said, It was a great Abuse in those Courts, their ordinary Practice being to grant a Capias without any Summons, so that the Party is driven to Bail in every trivial Action; and that tho' upon a Writ of Error this Matter is not assignable, because a Fault in the Process is aided by Appearance, &c. yet False Imprisonment lies upon it, and the Officer cannot Justifie here, as upon Process out of the Courts of Westminster. For suppose an Attachment should go out of the County Court without a Plaint, could he that executes it, Justifie? Yet a Sheriff may Justifie an Arrest upon a Capias out of the Common Pleas, tho' there were no Original: But Ministers to the Courts below, must see that things be duly done. Wherefore the Plaintiff must have Judgment.

10 Co. 76.

3 Cro. 446.

Monk's

Monk's Case.

A Debt was recovered against him in this Court, and the Money levied by the Sheriff, which he did not deliver, but was ordered to bring it into Court, until a difference that arose about it was determined.

Monk, being indebted to the King, a Writ was issued out to enquire what Goods and Chattels he had.

The Kings Attorney moved, that they might have leave to find this Money, the Court conceived, that the Money being but as a Depositum there, they might find it; and that the Court did not protect it from the Inquisition, as when Goods are under an Attachment, they cannot be distrained; but they would not make any direction for the finding of it.

Blackamore *versus* Mercer.

In Judgment against an Executor, a Fieri facias issued out to the Sheriff, with a Scire fieri Inquity, and a Devastavit was found according to the common course, the return whereof was, quod diversa bona quæ fuerunt testatoris, &c. habuit quæ elongavit & in usum suum proprium convertit.

It was objected against this Return, That it was not said Devastavit, for in some Cases an Executor may justly convert the Goods to his own use.

Hale said, anciently, when the Sheriff returned a Devastavit, which was not found by any Inquisition, and to which there was no answer, it was necessary to insert the word Devastavit. But otherwise, in a return upon this Special Writ; for if the case be, that he hath not wasted the Goods, but only eluded them, so as the Sheriff cannot come at them, the Executor is chargeable upon this Writ, de bonis propriis, and this Return answers the Writ.

Perrot *versus* Bridges.

In Trespass quare clausum fregit, and threw down his Fences.

The Defendant pleaded Not guilty to all, but the breaking of the Fences, and for that he justified; for that he was possessed of certain Corn in the place where, as of his proper Goods, and made a breach in the Fence, as was necessary for the carrying of it away.

The Plaintiff Demurs Specially, because he did not shew by what Title he was possessed of the Corn. And the Court were of Opinion, that for that cause the Plea was insufficient; for if a
Man

Man enters upon anothers Land and sows it, 'tis his Corn while he that hath right re-enters; so if Tenant at Will sows the Ground and then determins his own Will, he cannot break the Hedges to carry the Corn away. And Twilden said, if the Sheriff sells Corn growing by a Fieri facias, the Vendee cannot justifie an entry upon the Land to Reap it, until such time as the Corn is Ripe.

Anonymus.

If an Administrator brings an Action, the declaring hic in Curia prolar' of the Letters of Administration is but matter of form, tho' it hath been held otherwise. For Hale said, 'tis not part of the Declaration, as a Specialty is, upon which Debt, Covenant, &c. is brought, but only shewn upon the Declaration, to enable the Plaintiff to bring his Action.

Note, This is aided by a late Act of Parliament.

Jay versus Bond.

In Trespas the Defendant pleads, that Ante Quinden' Sancti Martini usque ad hunc diem præd' Jay Excommunicatus fuit & adhuc existit, & protulit hic in Cur' literas Testamentarias Episcopi Sarum quæ notum faciunt universis quod scrutatis Registeriis invenitur contineri quod Excommunicat' fuit, &c. pro contumacia in non comparendo to a Suit for Tythes, &c. in cujus rei Testimonium præd' Episcopus Sigillum apposuit.

It was objected, that such a kind of Certificate of Excommunication as this is, was not allowable; for it ought to be positive, and under the Seal of the Ordinary; whereas this is only a relation of what is found in their Register. Sed non allocatur, for tho' such a form of pleading would be altogether insufficient in our Law; yet their course is sometimes to certify Excommunication, sub sigillo Ordinarij, and sometimes per literas Testamentarias, as here.

Hale said, to plead Letters Patents without saying sub magno sigillo is naught, and that because the King has divers Seals.

Note, The entry was here quod Defendens venit & dicit, &c. Hale doubted, whether he ought not to have made some kind of defence, tho' no full defence is to be made, when Excommunication in the Plaintiff is pleaded.

Owen

Owen *versus* Lewyn.

The Plaintiff declared in Action upon the Case, upon the Custom of the Realm against a Common Carrier, and also for Trover and Conversion.

Hale said so he might, for Not guilty answers both; but if a Carrier loses Goods committed to him, a General Action of Trover doth not lye against him.

Termino Sancti Michaelis, Anno 24 Car. II.

In Banco Regis.

Davenant against the Bishop of Salisbury.

In Covenant. The Plaintiff declared, that the Bishop of Salisbury the Defendants Predecessor, being seized in Fee, demised unto him certain Lands for 21 years, reserving the antient Rent, &c. and Covenanted for him and his Successors, to discharge all publick Taxes assessed upon the Land; and that since the Defendant was made Bishop, a certain Tax was assessed upon the Land by virtue of an Act of Parliament, and that the Plaintiff was forced to pay it, the Defendant refusing to discharge it, unde Actio accrevit, &c.

The Defendant demurred, first to the form, for that it is said that the Predecessor Bishop was seized, and doth not say in jure Episcopatus. But Hale said the Old Books were, that where it was pleaded, that J. S. Episcopus was seized, that it implies seizin in the right of the Bishoprick which is true if he were a Corporation capable only in his politrick capacity, or as an Abbot, &c. but in regard he might also be seized in his natural capacity, the Declaration was for this Cause held to be ill. The matter in Law was, whether this were such a Covenant as should bind the Successor as incident to a Lease, which the Bishop is empowered to make by the 32 H. 8. for 'tis clear, if a Bishop had made a Covenant or Warranty, this had not bound the Successor at the Common Law, without the consent of the Dean and Chapter; and if it should be now taken, that every Covenant would bind the Successor, then the Statute of 1 Eliz. would be of no effect: But Hale said, admitting this were an antient Covenant, (and if so, it should have been averred to have been used in former Leases,) to discharge ordinary

ordinary payments, as Pensions or Tenths granted by the Clergy, then it might bind the Successor, by the 32 H.8. But it were hard to extend it to new charges: And we all know how lately this way of Taxes came in.

But the Court said, that the Declaration being insufficient for the other matter, they would not determine this. But they held, that however this Covenant should prove, it would not void the Lease. Vid. Gee, Bishop of Chichester, and Freedlands Case, 3 Cro. 47.

Note, Hale said, that antiently when the Sheriff returned a Return upon a Man, he was admitted to plead to it as to an Indictment. But the course of the Court of latter times has been not to admit any Plea to it, but to give the party to his Action upon the Case, as upon the return of a Devastavit, &c.

Cole versus Levingston.

In Ejectment, upon a long, and intricate Special Verdict, (the Chief Justice said, never was the like in Westminster Hall,) these following Points were resolved by the Court, and declared by Hale as the Opinion of himself, and the rest of the Judges.

First, That where one Covenantor to stand seized to the use of A. and B. and the Heirs of their Bodies of part of his Land, and if they die without Issue of their Bodies, then that it shall remain, &c. and of another part of his Land to the use of C.D. and E. and the Heirs of their Bodies, and if they die without Issue of their Bodies, then to remain, &c. that here there are no cross Remainders created by Implication, for there shall never be such Remainders upon construction of a Deed, tho' sometimes there are in case of a Will, 1 Rolls 837.

Secondly, As this Case is, there would be no cross Remainders if it were in a Will, for cross Remainders shall not rise between three, unless the words do very plainly express the intent of the Devisor to be so; as where black Acre is devised to A. white Acre to B. and green Acre to C. and if they die without Issue of their Bodies, vel alterius eor, then to remain; there by reason of the words alterius eor, cross Remainders shall be, Dier 303. But otherwise, there would not, Gilbert v. Wiry and others, 2 Cro. 655. And in this case, tho' some of the Limitations are between two, there shall be no cross Remainders in them, because there are others between three; and the intent shall be taken to the same in all.

The Dean and Chapter of *Durham*. against the Lord Archbishop of *Tork*.

In a Prohibition the Archbishop pleaded a Prescription, that he and his Predecessors have time out of mind been Guardians of the Spiritualties of the Bishoprick of Durham, Sede vacante; and Issue joyned thereupon, and tried at the Bar this Term.

Hale said, De jure communi the Dean and Chapter were Guardians of the Spiritualties, during the vacancy, as to matters of Jurisdiction; but for Ordination they are to call in the aid of a Neighbouring Bishop, and so is Linwood: But the Usage here in England is, that the Archbishop is Guardian of the Spiritualties in the Suffragan Dioceses, and therefore it was proper here to joyn the Issue upon the Usage.

There was much Evidence given, that antiently during the vacancy of Durham, the Archbishop had exercised Jurisdiction, both Sententious, and other, as Guardian of the Spiritualties: But since H. 8. time, it had been for the most part administered by the Dean and Chapter; and the Verdict was here for the Dean and Chapter.

King *versus* Melling.

In an Ejectment upon a Special Verdict the case was this, R. Melling seized in Fee, having Issue four Sons, William, Robert, Bernard and John, devised the Land in question in this manner.

I give my Land to my Son *Bernard* for his natural Life, and after his decease, I give the same to the Issue of his Body, lawfully begotten on a second Wife, and for want of such Issue to *John Melling* and his Heirs for ever. Provided, that *Bernard* may make a Joynture of all the Premises to such second Wife, which she may enjoy during her Life.

R.M. dies, Bernard in the life of his first Wife suffered a Recovery to the use of himself in Fee; and after her decease Marries a second Wife, and then by Indenture covenants to stand seized to the use of himself for Life, and after to the use of his Wife for her Life, for her Joynture, and dies.

J.M. Enters, and makes a Lease to the Plaintiff: And this Term after Arguments at the Bar, the Court gave their Opinions.

Rainsford for the Plaintiff, First. I hold in this Case, that B. M. takes but an Estate for Life, with a Contingent Remainder to the Issue by his second Wife, for the Devise is by express words for Life; as in *Archers Case*, 1 Co. a Devise to R. A. for Life, and after to the next Heir Male of R. and the Heirs Males of that Heir Male, Resolved to create, but an Estate for Life to R. A. I rely

mainly upon Wilds Case, 6 Co. which was brought before all the Judges of England; where the Devise was to a Man and his Wife, and after their decease to the Children, and resolved to be but an Estate for Life; 'tis true, there were Children at the time of the Devise, but in the end of the Case 'tis said, that in such Case if there were no Children, the Children born after might take by remainder, and the first Estate to be but for Life. Clerk v. Day, 1 Cro. 313. the Devise was to Rose his Daughter for Life, and that if she married after his Death and had Heir of her Body, then, that the Heir after his Daughter's Death should have the Land, and to the Heirs of their Body begotten, and if his Daughter died without Issue, then to a Stranger. It was held by Gawdy and Fenner, that Rose had but an Estate for Life in this Case, 1 Rolls 837. Devise to his eldest Son for Life, and after his decease to the Sons of his Body lawfully begotten; the Son resolved to have but an Estate for Life.

The Second point, Whether the power to make a Joynture be destroyed by the Common Recovery; these powers to make Estates are of two sorts, either Collateral, as when Executors have power by a Will to sell Land, and such a power cannot be destroyed as appears in Diggs's Case, 1 Co. of powers appendant to Estates as to make Leases, which shall continue after the Estates, to which the power is annexed determines; and the power in the Case at Bar to make a Joynture are of this second sort, and are destroyed by the alteration of the Estate to which it is annexed in perpetuity, as 1 Co. Albany's Case is, so that the Common Recovery being a forfeiture of the Estate for Life, by consequence 'tis an extinguishment of the power.

Thirdly, But admitting the power continues, whether it be well executed; and I hold that it is not, for being seized in Fee at the time of the Covenant to stand seized to the use of his Wife for her Joynture; and this without any reference to his power, the use shall arise out of his Interest, and not be executed by virtue of his power, according to the resolution in Sir Ed. Cleeves Case, 6 Co.

Twisden of the same Opinion. As to the first Point it must be agreed, that these words issue of the Body ex vi termini make not an Entail, if they were in a Conveyance by Act executed, no more than Children, as the words were in Wilds Case. 'Tis true, in a Will a Devise of Land to a Man and his issue creates an Entail, if the Devisee had no issue at that time, for otherwise those words would be void; for in regard they are limited to take presently, the issue born after, cannot take as by Remainder, there being none to take in presenti, they must be intended to be words of Limitation; as a Devise to a Man and his Heirs Males makes an Entail, or otherwise the word Males must be rejected; then seeing the words in themselves are not proper to make an Entail, the
next

next thing to be considered is the Intention, (which is to be known by the expressions in the VWill, and not any averment dehors,) the words are, I will give my Land to my Son for Life, and after his decease, I will give the same to the Issue. &c. so that the Land is given to him expressly for Life. Devise of Land in perpetuum makes Fee, but if Land be given by Deed in perpetuum, there an Estate only for Life will pass, 15 H. 7. A Devise to one paying 10 l. this is a Fee, 6 Co. Coliers Case: But a Devise to one for Life paying 10 l. makes but an Estate for Life; the Case of Furse and VVinter was, Mich. or Trin. 13 Regis Caroli Rot. 1339. A Devise to his two Daughters equally to be divided between them, and to the Survivor of them, and to the Heirs of the Body of the Survivor. This was so expressly to the Survivor, that it was resolved to be a Joynt Estate, and not in Common. The words here are after the decease of Bernard, I give the same to the Issue of the Body, &c. implying that the Issue should take by Purchase as a Gift, and not by Descent.

Again, The power given to Bernard to make a Joynture shews, that he could not do it by Virtue of his Estate, and therefore needed a power to be annexed. And tho' such powers are usually assised to Estates Tail; yet when the construction is doubtful, what Estate shall pass, the giving such a power is an argument, that 'tis such an Estate, that cannot make a Joynture, or the like by any other means. The words go further, and for want of such Issue, then to J.M. 'Tis true, if Land be devised to a Man, and if he dies without Issue then to remain, over the Devisee shall have an Entail. Owen 29. But it shall not be so in this Case, because that Clause is crowded in with other Clauses directly to the contrary. I rely mainly upon VVilds Case, 6 Co. and the Case quoted out of Bendlowes in the end of that Case. A Devise to Baron and Feme, and to the Men Children of their Bodies begotten; because it did not appear that there were any more Children, at that time; this made an Estate Tail. But if it had been, and after their decease to their Children, then the Children should take by Purchase tho' born after. 'Tis true, that case is variously reported in the Books, but I adhere to my Lord Coke, presuming, that being brought before all the Judges in the Argument of VVilds Case, it was a true Report.

As for the second Point 'tis plain, that the power is extinguished, for by the Recovery, the Estate for Life to which it was annexed in possibility is gone and forfeited, so that 'tis not necessary to dispute the third Point, whether well executed or no: But upon the whole, I agree with my Brother Rainsford, that the Plaintiff ought to have Judgment.

Hale. I differ from my two Brothers, and tho' I was of their Opinion at the finding of the Special Verdict; yet upon very great Consideration of the Case, I am of Opinion for the Defendant. I shall proceed in a different method from my Brothers, and

begin with that Point which they made last; and I agree with them, admitting that Bernard had but an Estate for Life, that the power was destroyed; also here the Recovery does not only bar the Estate, but all powers annexed to it, for the recompence in value is of such strong Consideration, that it serves as well for Rents, Possibilities, &c. going out of and depending upon the Land, as for the Land it self: So Fines and Feoffments do ransack the whole Estate, and pass, or extinguish, &c. all Rights, Conditions, Powers, &c. belonging to the Land, as well as the Land it self.

Secondly, I agree with my Brother Rainsford, that if Bernard had but an Estate for Life by the Devise, the power was not well executed. Where Tenant for Life has a power to make Leases, 'tis not always necessary to recite his power when he makes a Lease; but if he makes a Lease, which will not have an effectual continuance, if it be directed out of his interest, there it shall be as made by virtue of his power; and so it was resolved in one Roger's Case, in which I was Counsel.

Again, Tho' it be here by Covenant to stand seized, an improper way to execute his power; yet it might be construed an Execution of it, Mich. 51. In this Court, Stapleton's Case, where a Devise was to A. for Life, Remainder to B. for Life, Remainder to C. in Fee, with power to B. to make his Wife a Joynture. B. covenanted to stand seized for the Joynture of his Wife, reciting his power, tho' this could not make a legal Joynture; yet it was resolved to enure by virtue of his power, quando non valet quod ago ut ago valeat quantum valere potest. But in this Case Bernard has got a new Fee, which tho' it be defeasible by him in Remainder; yet the Covenant to stand seized shall enure thereupon, and the use shall arise out of the Fee.

Thirdly, I was at the first opening of the Case of Opinion, that Bernard had but an Estate for Life, but upon deep Examination of the Will, and of the Authority, and Considerations of the Consequences of the Case, I hold it to be an Estate Tail.

And first to ease that Point of all difficulties, it cannot be denied; but a Devise to a Man, and the Heirs of his Body by a second Wife makes an Estate Tail executed, tho' the Devisee had a Wife at the time. As the Case often cited, Land given to a Married Man and a Married Woman, and the Heirs of their Bodies. We are here in case of the Creation of an Estate Tail, where intention has some influence (*voluntas Donatoris, &c.*) and may help words which are not exactly according to legal form, 39 Ass. 20. Land given to a Man and his Wife, & hæredi de corpore & uni hæredi tantum, this judged an Entail. Again, we are in case of an Estate Tail to be created by a Will, and the intention of the Testator, is the Law to expound the Testament; therefore a Devise to a
Man

Man and his Heirs Males, or a Devise to a Man, and if he dies without Issue, &c. are always construed to make an Entail. It must be admitted, that if the Devise were to B. and the Issue of his Body, having no Issue at that time, it would be an Estate Tail; for the Law will carry over the word Issue, not only to his immediate Issue, but to all that shall descend from him: I agree it would be otherwise, if there were Issue at the time. Tayler and Sayer, 41 Eliz. 401. 541. a Devise to his Wife for Life, Remainder to his Issue, (having two Children) it was held the Remainder was void, being to the Issue in the singular number, for uncertainty which should take. But that was a little too rank, for Issue is nomen collectivum. 1 Cro. 742.

Again, I agree, if a Devise be made to a man, and after his death to his Issue (or Children,) having Issue at that time, they take by way of Remainder. And that was the only Point adjudged in Wild's Case, and there also against the Opinion of Popham and Gawdy.

This way being made, I come to the Case it self, and shall briefly give my Reasons, why I hold Bernard has an Estate Tail.

First, Because the word Issue is nomen collectivum, and takes in the whole Generation ex vi termini; and so the Case is stronger than if it were Children: And where 'tis said, to the Issue that he shall have of the Body of the second Wife; that is, all that shall come of the second Wife: For so 'tis understood in common Parllance.

Secondly, In all Acts of Parliament, Exitus is as comprehensive as Heirs of the Body. In Westm. 2. de donis, Issue is made a term of equivalence to Heirs of the Body; for where it speaks of the Alienation of the Donee, 'tis said, quo minus ad exitum discederet. So in 34 H. 8. of Entails settled by the Crown.

'Tis true, in Conveyances, &c. the wisdom of the Law has appropriated the word Heirs as a Term of Art. In Clerke's Case: A Lease was made to commence after the death of his Son without Issue; the Son had a Son and died, and then that Son died without Issue. It was Resolved both in the Kings Bench and the Exchequer, that the Lease should commence; for Issue being nomen collectivum, whenever the Issue of the Son failed, the term of Commencement did happen.

But now to see the difference: Tyler's Case, Mich. 34 Eliz. B.R. He had Issue A. B. C. and D. and Devised to his Wife for Life, and after her death to B. his Son in Tail, and if he dies without Issue, then to his Children. A. had Issue a Son and died, and B. died without Issue.

Resolved,

Resolved, that the Son of A. should not take as one of the Children of the Testator. Which Case I cite, to shew the odds between the word Issue and the word Children.

My second Reason is from the manner of the Limitation, which is to his Issue; and of his Body lawfully begotten upon the second Wife, Whose agreeable to an Estate Tail; and the meaning of a Testator is to be spelled out by little Hints. It is admitted in Wild's Case in the 6 Co. 17. that if the Devise had been, to the Children of their Bodies, it would have been an Entail.

Thirdly, It appears by the Devise, that the Testator knew there could be no Children at that time, and shall not be supposed to intend a contingent Remainder.

Fourthly, It appears that the Testator did not intend to prefer the Children of the first Wife of Bernard, but did the Children of the second, and therefore cannot be thought to mean, that John the younger Brother of Bernard should take before failure of the Issue which Bernard should have by his second Wife. And to this purpose is Spalding's Case, 3 Cro. 185. A Devise to his eldest Son and the Heirs of his Body after the death of his Wife; and if he died living the Wife, then to his Son N. And devised other Lands to another Son, and the Heirs of his Body; and if he died without Issue, then to remain, &c. The first Son died living the Wife. It was strongly urged, that his Estate should cease; for being said, If he died living the Wife, this was a Corrective of what went before. But 'twas Ruled by all the Court, that it was an absolute Estate Tail in the first Son, as if the words had been, If he died without Issue living the Wife; for he could not be thought to intend to prefer a younger Son before the Issue of his eldest.

Fifthly, The words are further, and for want of such Issue, then to John; which words in a Will do often make an Estate Tail by Implication. As 4 Jac. Robinson's Case: A Devise to A. for Life, and if he died without Issue, then to remain; A. took an Entail. So Burley's Case, 43 Eliz. A Devise to A. for Life, Remainder to the next Heir Male; and for default of such Heir Male, then to remain. Adjudged an Estate Tail. 'Tis true, Dyer 171. is, where Lands were Devised to a man and the Heirs Males of his Body, and if he died without Issue, &c. these last words did not make a Tail General to the Devisee: for an Implication of an Estate of Inheritance shall never ride over an express limitation of an Inheritance before; being 'tis said here for want of such Issue the Land should remain, 'tis plainly meant, that it should not before the Issue failed, and then the Issue must have it so long (for none else can,) and so 'tis an Estate Tail.

I come

I come now to Authorities: 6 Eliz. Anderson, num 86. Moor pl. 397. A Devise to his Son for Life, and after his decease to the Men Children of his Body, said to be an Estate Tail, and so cited by Coke in that Book, and so contrary to his Report of it in Wild's Case, Bendloes, num. 124. But that Case is not so strong as this; for Children is not so operative a word as Issue. Rolls 839. A Devise to his eldest Son for Life, & non aliter, (for so were the words, tho' not printed in the Book) and after his decease to the Sons of his Body; it was but an Estate for Life, by reason of the words Non aliter. Hill. 13 Car. 2. Rot. 121. Wedgward's Case: A Devise to his Son Thomas for Life, and after his decease (if he died without issue living at his death) then to the Daughter, &c. it was held to be an Estate for Life. But were it an Estate Tail or no, it was not necessary to be resolved, the Case depending upon the destruction or continuance of a Contingent Remainder, which would have been gone had the Devise made an Estate Tail; against, there being an express Devise for Life, they would not raise a larger Estate by Implication.

Again, Wild's Case, where Lands were Devised to A. for Life, Remainder to B. and the Heirs of his Body; Remainder to Wild and his Wife, and after their decease to their Children. And the Court of Kings-Bench were at first divided: Indeed, it was afterwards adjudged an Estate for Life to Wild and his Wife:

First, Because having limited a Remainder in Tail to B. by express and the usual words; if he had meant the same Estate in the second Remainder, 'tis true he would have used the same words.

Secondly, It was not, after their decease to the Children of their Bodies; for then there would be an Eye of an Estate Tail.

Thirdly, The main Reason was, because there were Children at the time of the Devise; and that was the only Reason the Resolution went upon in the Exchequer Chamber. And tho' it be said in the latter end of the Case, That if there were no Children at that time, every Child born after might take by Remainder; 'tis not said positively that they should take: And it seems to be in opposition to their taking presently; but however that be, it comes not to this Case: For tho' the word Children may be made nomen collectivum, the word Issue is nomen collectivum of it self. Hill. 42. and 43 Eliz. Bisfield's Case: A Devise to A. and if he dies not having a Son, then to remain to the Heirs of the Testator. Son was there taken to be used as nomen collectivum, and held an Entail.

I come

I come now to answer Objections:

First, 'Tis objected, that in this Case the Limitation is expressly for Life, and in that respect stronger than Wild's Case: And this is the great difficulty.

But I Answer:

That tho' these words do weigh the Intention that way, yet they are ballanced by an apparent Intention that weighs as much on the other side; which is, That as long as Bernard should have Children, that the Land should never go over to John; for there was as much reason to provide for the Issue of the Issue, as the first Issue.

Again, A Tenant in Tail has to many purposes but an Estate for Life.

Again, 'Tis possible that he did intend him but an Estate for Life, and 'tis by consequence and operation of Law only that it becomes an Estate Tail. 1651. Hansy and Lowther: The Case was, A Copyholder surrendered to the use of his Will, and Devised to his first Son for Life, and after his decease to the Heir Male of his Body, &c. This was Ruled to be an Estate Tail; and this differs from Archer's Case in the 1st of Co. for that the Devise there was for Life, and after to the Heir Male, and the Heirs of the Body of that Heir Male: There the words of Limitation being grafted upon the word Heir, it shews that the word Heir was used as Designatio personæ, and not for Limitation of the Estate. So is the Case of Clerk and Day, 1 Cro. 313.

Another Objection was, That there being a Power appointed to Bernard to make his Wife a Joynture, it shews, that it was intended he should have but an Estate for Life, which needed such a Power, and not an Estate Tail; for then he might have made a Joynture without it?

I Answer, That Tenant in Tail cannot, by virtue of such Estate, make a Joynture, without discontinuing or destroying his Estate. Sed Judicium pro Quer'. There being Justice Twisden and Justice Rainsford against the Chief Justice.

Termino

Termino Sancti Hillarij, Anno 24 & 25 Car. II.

In Banco Regis.

Anonymus.

A Prohibition was prayed to the Ecclesiastical Court, for that they Cited one out of the Diocels to Answer a Suit for a Legacy: But it was denied, because it was in the Court where the Probat of the Will was. For tho' it were before Commissioners appointed for the Probat of Wills in the late Times; yet now all their Proceedings in such cases are transmitted into the Prerogative Court. And therefore Suits for the Legacies contained in such Wills ought to be in the Archbishop's Court; for there the Executor must give account, and be discharged, &c.

Note, When a man is in custodia Marescalli, any man may Declare against him in a Personal Action, and if he be bailed out, he is still in custodia to this purpose, (viz.) quoad Declarations brought in against him that Term: For the Bail are (as it were) Delegated by the Court to have him in Prison. Hob.

Error is not well assigned, That there was no Bail filed; unless added, That the Defendant was not in custodia.

Debt.

In an Action of Debt upon a Sheriffs Bond, the Case was this:

A man was Arrested upon a Latitat, in placito Transgr' ac etiam bille pro 40 l. de debito. And the Condition of the Bond given to the Sheriff was, to appear at the Day of the Return of the Writ, to answer to the Plaint in p'ito debito. And it was urged, that this made the Bond void by the Statute of 23 H. 6. for the Condition should have been to Appear at the Day, to Answer in the Action upon which the Process went out, and that was in this Case but an Action of Trespass, and the adding the Ac etiam debiti, &c. is but to satisfy the late Act, and for Direction to the Sheriff, to what Value he shall require Bail. And it was usual to Endorse the Cause of Action before the Statute upon the Latitats, that the Sheriff might insist upon Bail accordingly. So this is a material Variance from the Statute, and not like some of these which are remembered in Beaufage's Case in the 10 Co. and Dyer 364. And to this the Court inclined.

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And

And Hale Cited a Case between Button and Low, adjudged Mich. 1649. An Attachment went out of Chancery to answer Coram nobis in Cancellaria ubicunque, &c. and the Sheriff took a Bond, Conditioned to Appear Coram Rege in Cancellaria ubicunque, &c. apud Westmonasterium: And for the addition of Westminster, the Bond was held to be void.

Anonymus.

The Court was moved for a Prohibition to the Archbishop's Court, to stop their Proceedings in a Cause belonging to the Jurisdiction of Durham, upon a Suggestion, that the Dean and Chapter of Durham, Sede vacante, have Cognizance there, as Guardians of the Spiritualities.

And the Court granted a Prohibition; for the Right of Jurisdiction was tryed between the Archbishop and Dean and Chapter the last Term, and found against the Archbishop; and therefore he was concluded by that Verdict, until the Record was reversed by Error of Attaint.

Thodic's Case.

Thody and two others were Indicted, for that Conspiracione inter eos habita, they enticed J. S. to play, and cheated him with False Dice.

Thody pleaded, and was found Guilty; the others not having pleaded. It was moved, that Judgment might not be Entred against him until the others came in; for being laid by way of Conspiracy, if the rest should chance to be acquitted, no Judgment could be given against him: And so is 14 H. 6. 25.

Hale said, If one be Acquitted in an Action of Conspiracy, the other cannot be Guilty: But where one is found Guilty, and the other comes not in upon Process, or if he dies hanging the Suit; yet Judgment shall be upon the Verdict against the other. And so is 18 E. 3. 1. and 24 E. 3. 34.

Wild said, The difference was, where the Suit was upon Conspiracy wherein the Villanous Judgment was to be given, and where the Conspiracy is laid only by way of Aggravation, as in this Case.

Hale said, It would be the same in an Action against two upon the Case for Conspiracy; but not in such Actions, where tho' there be a Charge of Conspiracy, yet the Gist of the Action is upon another matter.

But the Court said, They would give him two or three days for the bringing in of the other two, and defer the Entry of the Judgment in the mean time.

Methyn

Methyn versus the Hundred of Thistleworth.

The Case was moved again by North Solicitor. He urged for the Plaintiff, That the Issue being, Whether they took the Felon upon Fresh Suit? It being not found that there was any actual Taking, or that the Fresh Suit continued until Sir J. Ash found the Felon in the presence of Sir P. Warwick. Also, it was found that Sir J. Ash was a Justice of Peace, and therefore it was his duty to Apprehend him.

To this it was Answered,

That the Statute of Winton (upon which the Action is founded, and not upon the 27 of Eliz. and therefore it is ill if it concludes contra formam Statutorum) doth not say shall Take, but shall Answer the Bodies of the Offenders; which is, Answer them to Justice: And therefore if the Felon be taken upon another account, and the Country finding him in Prison, cause him to be Indicted; this satisfies the Statute, Goldsb. 55.

Again, it was more decent for Sir John Ash being concerned as an Inhabitant of the Hundred to leave this Matter to the other Justice of the Peace; (for it has been known, that Justices of the Peace have been Censured in the Star-Chamber, for being too forward to interpose in their own business :) But if it were an omission of the Duty of his Office, that could not be Objected to him as an Inhabitant, having done enough to satisfy the Statute of Winton.

Wild said, That the Defendant should have Demurred, because the Issue is ill joyned, (*viz.*) absque hoc that he took him super eadem recenti insecutione: For if he were not immediately taken upon Fresh pursuit, it were sufficient; but the Verdict finding Fresh Suit was made, it may be taken by Intendment (which shall help out a Special Verdict,) that it was directed this way, and continued until the finding of him in the presence of Sir P. Warwicke. Et sic Judicium pro Def. Ante.

Dacres versus Duncomb.

In Trover, after Impar lance the Defendant pleaded, That the Plaintiff (with two others) brought Trover for the same Goods before; which Action is still depending: And demanded Judgment of the Writ.

The Plaintiff Replied, That the other two died before the Action was brought, and so that Writ abated. To which it was Demurred, and Judgment quod respondeat ouster: For in all Actions, where one Plaintiff dies, the Writ abates; (save in an Action brought by two Executors.) And Hale said, So it

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Should

should in a Quare Impedit; but that it is reversible by Journeys Accounts.

Wild said, That the Pleading, That the Two died before the Action brought, was double.

Hale. No, for he must shew both were dead to enable him to bring this Action alone.

Twisden. How comes this Plea in Abatement after an Impar-
lance?

Hale. Tho' after an Imparlance the Defendant cannot plead a Misnomer, or the like, or Ancient demesne; because he admits, he ought to answer the Writ; yet such a Plea in Abatement as this he may. But that comes not in question; because the Plaintiff Replied to it, and did not Demur.

Nota, Debt for Rent in the Detinet against an Executor, shall be brought where the Lease was made; because 'tis for the Arrears in the Testators time: But where 'tis in the debet and detinet, (viz.) for Rent, incurred in the Executors time, it must be where the Land lies. And so Agreed by the Court.

Nota, No Tythes to be paid for Pasture wherein the Plow-Horses are fed.

And Hale said, So it is of Saddle-Horses.

Anonymus.

A Foreign Attachment in an Inferiour Court was pleaded in this manner: That by Custom (time out of mind) whoever Levied a Pleint, pro aliquo debito, against another, upon Surmize, That a Stranger was Indebted to the Defendant; that Process issued forth to attach, &c.

Against this Pemberton Objected, That it was not said pro aliquo debito which did arise infra Jurisdictionem Curiae.

The Court said, that they need not express that the Debt did arise infra Jurisdictionem; for perhaps it did not. And yet, if an Action be brought in such case, and the Debt be said to be Contracted infra Jurisdictionem Curiae, if the Defendant will plead to it he may; but he shall never be admitted to assign for Error in Fact, that the Debt did arise extra Jurisdictionem Curiae. But if he had tendered such a Plea in the Inferiour Court upon Oath; then, if they had refused it, it would have been Error. Wherefore 'tis enough in this case to say, If a Pleint were Levied pro aliquo debito infra Jurisdictionem without averring that the Debt did arise within the Jurisdiction. Also there cannot be a Custom for a Foreign Attachment, before there be some Default in the Defendant. Wherefore the Pleading was there held to be Ill.

Mosdell

Mofdel, the Marshal of the Court, against Middleton.

IN Debe upon a Bond with Condition to be a true Prisoner, and to pay him so much by the week for Chamber Rent.

To this was pleaded the Statute of 23 H. 6. And the Court resolved, it was void by that Statute.

Hale said, a Bond for true Imprisonment is good prima facie; but the Defendant may aver, that it was also for ease and favour. And so it was adjudged in Sir John Lenthals time, who brought Debe upon a Bond of 2000 l. and the party pleaded, That it was taken for ease and favour; and upon the Tryal it appeared, That after that Bond the Defendant was permitted sometimes to go into the Country with a Keeper, whereas before he was kept strait Prisoner; and upon this matter the Bond was ruled to be void.

Twifden cited my Lord Hob. That a Gaoler could not take a Bond of his Prisoner for a just Debe.

Hale. That seems hard, because he takes it in another capacity. But he cannot take a Bond for his Fees, because it would give him opportunity to extort. Also, here part being against the Statute it avails all, but the Condition of a Bond or Covenant may in part be against the Common Law, and stand good in the other part. Hob.

Cox versus Matthews.

IN Action for a Nufans, in stopping of the Lights of his House.

Exception was taken to the Declaration, for that he did not say antiquum Messuagium; and yet it was ruled to be good enough, for perhaps the House was new Built: And the truth of this Case was said to be, that the Defendant had Built the House and Let it to the Plaintiff, and would now go to stop up the Lights.

Hale said, if a Man hath a Watercourse running thorough his Ground, and erects a Mill upon it, he may bring his Action for diverting the Stream, and not say antiquum molendinum; and upon the Evidence it will appear, whether the Defendant hath Ground thorough which the Stream runs before the Plaintiffs, and that he used to turn the Stream as he saw cause, for otherwise he cannot justify it, tho' the Mill be newly erected.

Watson

Watson *versus* Snead.

In Debt for 20 l. the Plaintiff declared, that the Defendant concessit se teneri per scriptum suum Obligatorium, &c. the words of the Deed were, I do acknowledge to *Edward Watson* by me twenty pounds upon Demand, for doing the work in my Garden.

Upon a Demurrer to the Declaration, it was adjudged a good Bond.

Morle *versus* Slue.

The Case was argued two several Terms at the Bar, by Mr. Holt for the Plaintiff, and Sir Francis Winnington for the Defendant, and Mr. Molloy for the Plaintiff, and Mr. Wallop for the Defendant; and by the Opinion of the whole Court, Judgment was given this Term for the Plaintiff.

Hale delivered the Reasons as followeth.

First, By the Admiral Civil Law the Master is not chargeable, pro damno fatali, as in case of Pirates, Storm, &c. but where there is any negligence in him he is.

Secondly, This Case is not to be measured by the Rules of the Admiral Law, because the Ship was *infra corpus Comitatus*.

Then the First Reason wherefore the Master is liable is, because he takes a Reward; and the usage is, that half Wages is paid him before he goes out of the Country.

Secondly, If the Master would, he might have made a Caution for himself, which he omitting and taking in the Goods generally, he shall answer for what happens. There was a Case (not long since) when one brought a Box to a Carrier, in which there was a great Sum of Money, and the Carrier demanded of the Owner what was in it; who answered, That it was filled with Silks and such like Goods of mean value; upon which the Carrier took it, and was robbed. And resolved that he was liable. But if the Carrier had told the Owner, that it was a dangerous time, and if there were Money in it, he durst not take charge of it; and the Owner had answered as before, this matter would have excused the Carrier.

Thirdly, He which would take off the Master in this Case from the Action must assign a difference between it, and the Case of a Hoyman, Common Carrier or Inholder.

'Tis objected, That the Master is but a Servant to the Owners.

Answer, The Law takes notice of him as no more than a Servant.

'Tis known, that he may impawn the Ship if occasion be, and sell bona peritura: He is rather an Officer than a Servant. In an Escape the Gaoler may be charged, tho' the Sheriff is also liable; for

4 Co.
Southcotes
Case.

2 Cro. 330.
Hob. 11.

for respondeat superior. But the Turnkey cannot be sued, for he is but a meet Servant: By the Civil Law the Master or Owner is chargeable at the Election of the Merchant.

'Tis further objected, That he receives Wages from the Owners.

Answer, In effect the Merchant pays him, for he pays the Owners freight, so that 'tis but handed over by them to the Master; if the Freight be lost, the Wages are lost too, for the rule is Freight, is the mother of Wages: Therefore, tho' the Declaration is, that the Master received Wages of the Merchant, and the verdict is, That the Owners pay it, 'tis no material variance.

Objection, 'Tis found, that there were the usual number of Men to guard the Ship?

Answer, True, for the Ship, but not with reference to the Goods, for the number ought to be more or less as the Port is dangerous, and the Goods of value, 33 H. 6. 1. If Rebels break a Gaol, so that the Prisoners escape, the Gaoler is liable; but it is otherwise of Enemies; so the Master is not chargeable, where the Ship is spoiled by Pirates. And if a Carrier be robbed by an Hundred men, he is never the more excused. Ante.

Cox versus Mathews.

The Case was moved again. And Hale said, that if a Man Builds a House upon his own ground, he that hath the Contiguous ground may Build upon it; also, tho' he doth thereby stop the Lights of the other House, for *cujus est solum ejus est usque ad cælum*; and this holds, unless there be Custom to the contrary, as in London. But in an Action for stopping of his Light, a Man need not declare of an antient House; for if a Man should Build an House upon his own ground, and then grant the House to A. and grants certain Lands adjoining to B. B. could not Build to the stopping of A's Lights in that Case, 1 Cro. Sands and Tresfuses 415. But the Case at Bar is without question, for he declares, That the Defendant fixed Boards to the Windows of the Plaintiff's House. Poph. 170.

Anonymus.

Upon a motion to set aside an Inquisition taken before the Coroner, *super visum corporis*, certified into this Court, that J. S. killed himself, and was *Non compos mentis*. Hale said, such an Inquisition that finds a Man *Felo de se* is Traversable, but no Traverse can be taken to make a Man *Felo de se*; but *fugam fecit* is never Traversable.

Clue

Clue versus Bailly.

In Replevin the Defendant made Conusans as Bailiff to J. S. who demised the place where, under certain Rent, &c.

The Plaintiff Traverses the Demise, and concluded & hoc paratus est verificare. To which the Defendant demurred generally. And the Court were in doubt, whether this ill conclusion of the Plea were not helped upon a general Demurrer.

Hale, It were well the Causes of Demurrer were always assigned Specially; and not to say only, incertum & dubium & caret forma, &c. The old way was, when Pleadings were drawn at the Bar to make the exception immediately, and the other Party might mend if he pleased, or might Demur if he durst venture it. And tho' now they are put in Paper; yet such a Course should be observed, for Demurrers were not designed to catch Men: This not concluding to the Country, seems to be but matter of form, and the Demurrer should have been quia non bene concludit. Here the Defendant pleads, that J. S. demised the Land for Life, and without expressing the place of the Demise, because of necessity it must be upon the Land.

Blake versus . . .

Error of a Judgment in Replevin in the Mannor Court of Hexham in Northumberland, where the Defendant avowed for Damage sefant.

The Plaintiff replied, that J. S. was seized of the Mannor of Tallowfield in D. and that time out of mind he had Common, &c. in the place where, and shewed himself to be Tenant, and justified the putting in of his Beasts for Common; and the Prescription being traversed, it was found for the Avowant. The Errors assigned were.

First, In the Venire, which was, quia nec the Plaintiff, nec Defendant, aliqua affinitate attingunt, instead of qui nec. Hale said, it was aided by the Statute of 8 H. 6. that helps Error in Process. But Twisden said, that Statute did not extend to inferiour Courts.

Another Error insisted on was, that the Avowant did not shew that the Mannor of Tallowfield was infra Jurisdictionem Curie: But the Venire was, extra vill' & Manerium de Tallowfield, infra Jurisdictionem Curie. But the Court held, that that was not sufficient to intimate that it was within the Jurisdiction, but must have been shewn in pleading. And Hale said, seeing the Plaintiff had omitted to do it, the Avowant might in his Rejoinder have alleged Tallowfield to have been within the Jurisdiction, as where one pleads a Plea without a place, the other is not bound to Demur,

Demurr, but for his expedition may shew the place in his Replication. Then VVild said, this seems to be aided by the Statute of 21 Jac. which Enacteth, That if the Jury comes out of any one of the places it sufficeth; and here the Jury came as well out of the Vill where the Beasts were taken, (shewn to be within the Jurisdiction) as the Mannor of Tallowfield.

Hale. That will not serve in this Case, for the Court could not Award a Venire to a place out of the Jurisdiction, nor Jurors could not be returned out of such a place to try a Cause there.

Another Error assigned was, that the Award of the Venire was *præceptum est per seneschallum*, and not said in *eadem Curia*.

To which it was answered.

That being on the same day upon which the Court was said to be held, it must be intended so.

VVild held, the Judgment ought to be reversed for the last Cause.

Twisden, Principally for the first, for he held that the Statute of the 8 H. 6. Aided not Process in inferiour Courts; therefore, where in the Award of the Venire it has been *per quos rei veritas melius Scire, poterit* instead of *Sciri*, the Judgment has been reversed.

Hale said, that it ought to be *Sciri*, for so it is in the Register, and in the Statute of Eliz. that sets the Estate of Jurors at 4 l. per ann. But for the second Error, he held that the Judgment ought to be reversed.

Whaley *versus* Tancred.

TRin. 23 Car. 2. Rot. 1513. In an Ejectment the Case was this; Lessee for years makes a Feoffment and levies a Fine, five years pass, Whether the Lessor should have five years after the Term expired was the question; and after the hearing of Arguments the Court resolved, that he should, as well as when Lessee for Life levies a Fine, which differs not in reason from this Case, for there the Lessor may have his Writ de consimili casu presently, as here he may by his Assize. And though in 9 Co. Podgers Case, 'Tis said, that where Lessee for years is ousted by a Disseisor, who levies a Fine, if five years pass without claim the Lessor is barred, that is not the same with this Case; for the Disseisor comes in without the consent of the Lessee, and of his own wrong; and if he can defend his Possession five years he shall hold it; but here all is done with the privity, and by the means of the Lessee who is trusted with the Possession, and it would be of most mischievous import to Mens Inheritances, if they should not have five years after the Lease ended; and it being put of a Disseisin in Podger's Case, seems to imply the contrary in other Cases; and tho' there were many notorious Circumstances

ces of fraud in Fermours Case, which Co. in his report of it lays much weight upon; yet it does not thence follow, that the Law is not the same where there are not such evidences of fraud. In other Books where that case is reported, the resolution does not seem to go so much upon the particularities of the fraud. 'Tis fraud apparent in the Lessee.

Willston *versus* Pilkney.

IN Debt for Rent the Plaintiff declared, that the Dean and Chapter of, &c. demised to the Defendant for Life; by force of which he entered and demised the Land to the Plaintiff for years, by virtue of which he was possessed, and afterward granted to the Defendant, reserving a Rent, for which he brings his Action.

TO this Declaration the Defendant Demurs.

First, Because he doth not say of the Deans Demise hic in Curia prolat', which Demise must be by Deed.

Secondly, He says, that the Defendant entered by force thereof, which is impertinent to be alledged upon a Lease for Life, because Livery implies it.

Thirdly, As to the matter, that the Reservation was void, it being upon a surrender by Parol. A Rent cannot be reserved upon a Feoffment by Parol; so where Lessee for life, or years assigns over his whole interest, 12 H.4.14. 9 H.6.43. 12 H.4.17. also no Rent can be reserved upon a Conveyance that works an Extinguishment, unless by Deed, where it is good upon the contract. Pero's Case, 3 Cro. 101. is, that a Surrender shows the interest to all intents and purposes between the Parties. Dier 251. The Tenant for Life agreed with him in Reversion, that he should have his Land for the Annual Rent of 20s. 'Tis doubted there whether this amounts to a Surrender, there being no Deed or Livery. But in 2 Rolls 497. 'tis said, if it had been a Surrender, the reservation had been void.

Hale. I do most doubt of the first exception, because the Deed was not produced. And for the second it were better pleading to have said by force of which he was seized; but that's not of necessity. And as to the matter, the Court resolved for the Plaintiff. For

1. The Reservation was good by the contract, tho' without Deed. And so it was adjudged in this Court in Manly's Case, that Tenant for years might assign his whole Term by Parol, reserving Rent; so in the Case of Purcas and Owen, 23 Car. But it was doubted, whether an Action would lie until the last day were past. 'Tis all one where the Grant is made to him in Reversion, which is not actually, but consequentially a Surrender by operation of Law, before which the contract is perfected, upon which the
Rent

Rent arises. 7 E. 4. 18. that the Lessee may Surrender upon Condition; and there is no reason, why a Rent cannot be created upon it, as well as a Condition. If it were in the case of Tenant for Life, a Deed were requisite, as well for a Rent as a Condition in respect of the Freehold, but that is not so in case of Tenant for years. Vide Postea Cartwright and Pinkney.

Termino Sanctæ Trinitatis, Anno 25 Car. II.

In Banco Regis.

Hanslap *versus* Cater.

IN Error upon a Judgment in the Court of Coventry, where the Plaintiff Cater declared, That the Defendant being indebted to him *infra Jurisdictionem Curie*, pro diversis Bonis & Mercimoniis ante tunc venditis & deliberatis, did then and there assume, &c. Upon Non Assumpsit pleaded, and a Verdict and Judgment for the Plaintiff, the Error assigned was, That the Goods were not alledged to be sold within the Jurisdiction of the Court.

Hale and Wild seemed to be of Opinion, that it was well enough, the being indebted, and the promise being laid to be within the Jurisdiction.

Twisden Contra, and said he had known many Judgments reversed for the same Cause.

It being moved again this Term, Hale consented that it should be reversed according as the latter Presidents have been; for he said it was his Rule *Stare decisis*, Parsons and Muden, Pasch. 22 Car. 2: Rot. out of Barnstable Court.

John Brown's Case.

HE was indicted upon the Statute of 3 H. 7. cap. 2. for the forcible taking away and marrying of one Lucy Ramsy, of the Age of fourteen years, having to her Portion 5000 l. He was tried at the Bar, and the fact appeared upon the Evidence to be thus, She was inveigled into Hyde Park by one Mrs. P. confederate with Brown, (who had prepared a Coach for that purpose) to take the Air in an Evening, about the latter end of May last, and being in the Park the Coachman drove away from the rest of the company, which gave opportunity to Brown, who came to the Coach side in a Vizar-mask, and addressing himself first to Mrs. P.

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soon

soon perswaded her out of the Coach, and then pulls out a Maid servant there attending Mrs. Ramsy; and then gets himself into the Coach, and there detains her until the Coachman carried them to his Lodgings in the Strand, where the next Morning he prevails upon her, (having first threatned to carry her beyond Sea if she refused) to marry him, but was the same day apprehended in the same House.

It was at first doubted, whether the Evidence of Lucy Ramsy was to be admitted, because she was his Wife *de facto*, tho' not *de jure*. But the Court *seriatim* delivered their Opinions, that she was to be admitted a Witness.

First, For that there was one continuing force upon her, from the beginning till the Marriage; wherefore, whatsoever was done while she was under that violence was not to be respected.

Secondly, As such Cases are generally contrived, so heinous a Crime, would go unpunished, unless the Testimony of the Woman should be received.

Thirdly, In Fulwoods Case, reported in 1 Cro. (which was read in the Court) the Woman was a Witness, tho' married as here; and Rainsford cited my Lord Castlehavens Case, where the Countess gave Evidence, that he assisted the committing a Rape upon her: But Hale said he was not governed by that case, because there was a Wife *de jure*, the Evidence being clear as to all the Points of the Statute, (*viz.*)

First, That the taking was by force.

Secondly, That the Woman had substance according to the Statute.

Thirdly, That Marriage ensued, tho' it did not appear she was deflowred, the Jury found him guilty. Whereupon Judgment was given, and he was hanged.

Note, 39 Eliz. cap. 9. takes away Clergy from this Offence.

Bayly versus Murin.

In an Ejectment upon a Special Verdict, the Case was to this effect.

One Cooper Vicar of Granbrook in Kent, being seized of an House and Lands thereunto appertaining, parcel of the Endowment of his Vicaridge situate in a Market Town in the year 1672. lets it for three years, and one year of the said Lease being expired the 11 of Sept. 1673. lets it for 21 years, to begin from Michaelmas following, reserving the Rent during the Term, payable at the usual Feasts, or within ten days after; this Lease was confirmed by the Archbishop (Patron of the Vicarage) and Dean and Chapter of Canterbury.

Some

Some years after Cooper dies, and the Question was, Whether Buck (the succeeding Vicar) could avoid this Lease?

The first Point was, Whether the Lease became void within 80 Days after the death of Cooper, by the Statute of Non-residence? 13 Eliz. 10. And as to that all the Justices were of Opinion, that Death would not make such a Non-residence as should avoid the Lease; for the Intention of the Statute was, to oblige the Incumbents to Residence.

First, By imposing of the Forfeiture of a years Value of their Benefice, if they did not Reside.

Secondly, By making their Leases void; which tho' prima facie seemed to be to their advantage, yet was not so in the consequence; for none would be induced to farm their Lands, because it was in their power to defeat their Leases by Non-residence.

Again, 'Tis plain the Statute meant a Wilful Absence, because it says, The party so offending the Statute of the 13th of Eliz. that allows Leases of Houses, &c. in Market Towns for 40 years, would be of no effect if Death should be interpreted a Non-residence, and the Confirmation of Patron and Ordinary would be to no purpose. Butler and Goodale's Case in the 6 Co. 21. b. is, that where the Incumbent is absent upon an Inhibition, or for the sake of his Health, he is not within the Penalty of that Law. There is only one single Authority against this, (viz.) Mott and Hale's Case in the 1 Cro. 123. which Twisden doubted, whether it were so adjudged, because my Lord Coke mentions it no where, supposing so Notable a Point would not have escaped his Observation, especially in a Case wherein he was Counsel. But Hale said, It was Adjudged by the Opinion of three Judges; tho' in Moor 'tis said, the Court was Divided; but it was a hard Opinion: And in the 38th of Eliz. B.R. Moor 609. the very Point was adjudged contrary.

The second Point, Whether it were void, because the Rent was reserved at the usual Feasts, or within Ten days after? For it was urged, that the Term ending at Michaelmas, would be expired before the last Payment: And for the other payments, 'tis for the Successor's advantage, because the Predecessor may dye within the Ten days. But the Court were clear of Opinion, in regard the Reservation was during the Term, that there should be no Ten days given to the Lessee for the last payment, according to Barwicke and Foster's Case in the 2 Cro. 227, 233.

The third point, Whether this were a Lease in Reversion, and so not warranted by the Statute of the 14 of Elizabeth? And all the Court held that it was. This Statute repeats that of the 13th of Eliz. as to Houses in Market Towns, (which Liberty was given, as Twisden said, to render those places more populous;) but excepts Leases in Reversion, which this is, being to commence at

at a Day to come, where a Power is annexed to an Estate for Life to make Leases in possession. A man cannot make a Lease to commence in futuro. In the 6 Co. Fitz William's Case, 4 E. 3. tit. Waste 18. the Lessor made a Lease to commence after the death of the Tenant for Life, and notwithstanding maintained an Action of Waste: And Co. Lit. citing that Case, distinguishes between a Grant of the Reversion, and a Lease in Reversion, as that Case was. In Plowden's Commentaries, Tracy's Case, A Lease made to commence at a Day to come, is given as a most proper Instance of a Lease in Reversion. In the 1 Cro. 546. Hunt and Singleton's Case, a Lease of an House for 40 years (there being 10 years unexpired of a former Lease) by the Dean and Chapter of St. Pauls, was held not warranted by the 14th of Eliz. The like was Resolved in C. B. 14 Car. 2. in the Case of Wyn and Wild, of a Lease of the Dean and Chapter of Westminster, and there the Court denied the Opinion in Tomson and Trafford's Case, Poph. 9. And two of the Judges seemed to be of Opinion, (and Twisden strongly), that if the Lease in the Case at Bar had been made to commence presently, it yet would have been void, there being another Lease in being; so that for so many years as were to come of the former Lease, it would be a Lease in Reversion: And that the 18th of Eliz. that permits a concurrent Lease, so that there be not above three years in being, shall not in their Opinion, make any alteration of the 14th of Eliz. but it only extends to the 13th of Eliz. because it recites that, but not the former. And so is the Opinion of Hobart, in the Case of Crane and Taylour 269. and it hath been often held, that it does not extend to the Statute of 1 Eliz. concerning Bishops. But of this Hale doubted, and rather conceived the contrary (viz.) That the Lease had been good, if it had been made to commence presently, there being less than three years to come of the former Lease. And that of the 18 of Eliz. did give a qualification to Leases made upon the 14th, as well as the 13th.

First, Because the 14 of Eliz. is a kind of an Appendix to the 13th of Eliz. and does not repeat it; but sub modo a little enlarging it as to Houses in Market Towns: Wherefore the 18th of Eliz. reciting the 13th, does by consequence recite the 14th also.

Secondly, There is such a Connexion betwixt all the Statutes, concerning Leases of Ecclesiastical persons, that they have been taken into the Construction of one another. The Statute of the 32d of H. 8. is not recited, neither in the 1st of the 13th of Eliz. yet a Lease is not warranted upon those Statutes, unless it hath the Qualifications required by the 32d of H. 8. And this course is usual in the Construction of Statutes made in *pari materia*.

Thirdly,

Thirdly, It would make a great Romage in Leases, as he conceived, if a Lease should be void, when there was never so little of a former Lease unexpired.

Fourthly, There is no Authority to the contrary. In Hunt and Singleton's Case there was 10 years of the former Lease in being, and upon that lay the weight of the Opinion. And Crane and Taylor's Case is concerning Covenants only; and the Reason that it doth not extend to the 1st of Eliz. is, because the 18th of Eliz. begins with Inferiour Ecclesiastical persons, and therefore cannot include Bishops.

Termino Sancti Michaelis, Anno 25 Car. II.

In Banco Regis.

Anonymus.

Payment is no good Plea to a Scire facias upon a Judgment: But in a Scire facias against the Bail, Hale said, he might plead, That the Principal paid the Money.

Hinchman *versus* Hles.

In a Replevin the Defendant avowed for Rent, upon a Lease made to the Plaintiff at Will.

The Plaintiff Replies, That the Defendant, before the Distress taken, made a Lease for years, by virtue of which the Lessee Entered.

The Defendant Rejoyns, and confesses the making of the Lease; but says, that there was a Special Agreement that the Lessee should not Enter until a time after; and traverses the Entry.

The Plaintiff Surrejoyns, and traverses the Agreement. To which the Defendant Demurs specially.

Hale. There are here two things considerable;

First, Whether the making of the Lease be a determination of the Will before Entry?

Secondly, Whether there may be a Traverse upon a Traverse in this Case?

As to the first: If the Lessor does any Act inconsistent with the Continuance of the Estate at Will, it shall determine it from such time as the Tenant at Will takes notice of it; tho' this may prove a mischievous Case, in regard of the frequency of Conveyancing

40 E. 3. 16.
simile in
Case de
Waste.

depancing by Lease and Release. An Outlawry of the Lessor shall not determine the Will until a Seizure, nor an Extent upon him until the Liberate. If the Lessor says, The Lessee shall hold it no longer: The Lessee (as soon as he knows of the words) he may take advantage of them as a determination of the Will. As where he in Reversion upon a Lease grants the Reversion, and brings Debt for the Rent. The Lessee, tho' before Attornment, may plead in Bar, that he hath granted away the Reversion: But this Plea will amount to an Attornment.

As to the second Point, Where a Traverse is not good without a Special Inducement, there a Traverse may be to that Inducement: As in Trespass, where the Justification is local by virtue of his Office, or the like, and in Hobart in Digby and Fitzherbert's Case.

If the Lease were by Parol, here the Collateral Agreement might be material. As if a Lease were made at Midsummer for 2 years, and it were agreed, that the Lessee should Enter but at Michaelmas, it would begin in point of Computation at Midsummer; but in point of Interest, not till Michaelmas.

Anonymus.

In a Suit for Tythes, the Defendant pleaded in the Spiritual Court, That the Tythes belonged to another, who was Rector, and not to the Plaintiff. Which Plea being refused, and Dath thereof made in this Court, a Prohibition was granted.

Anonymus.

In an Action upon the Case for Stopping of his Lights. The Plaintiff Declared, that he was possessed for divers years (and did not say how many,) and that time out of mind the Light came in at the Windows. Which was allowed a good form of alleging the Prescription.

Anonymus.

In an Ejectment. the Lessor of the Plaintiff had a Title to Enter for a Condition broken for Non-payment of Rent. Lease, Entry and Ouster was confessed, and the Court was moved, that in regard the Lessor having such a special Title, and no Estate until Entry, whether such an Entry should be supplied by the General Confession, or that there should be an Actual Entry? And it was held, that it should be supplied by the General Confession.

But Hale said, If A. Lets to B. and B. to C. to try the Title; the Confession of the Lease, Entry and Ouster, extends only to the Lease made to C. and not to that to B.

Anonymus.

Anonymus.

In Trespas against divers, one dies pending the Action, and notwithstanding the Venire and Distingas mentions all, and the Verdict is against all: If this Matter be surmized before Judgment, so that the Judgment be against the Survivors, 'tis well enough.

Anonymus.

Error to Reverse a Judgment given in the Burrow-Court of Shrewsbury, in an Action upon the Case, laid apud Villam Salopix in Warda Wallica ejusdem Villæ. The Error assigned was:

First; for that it appeared they awarded a Capias, which an Inferiour Court cannot do in an Action upon the Case. Vid. Stat. of 19 H.7. tho' it was said to be usual for the Palace Court to do it. Vid. Yelv. 1. But this was Over-ruled; because the Defendant appeared, which aids Discontinuance of Process.

Secondly, for that the Venire was awarded de vicineto Wardæ. And it was urged, that a Jury ought not to come out of a Ward.

Hale. It hath been sometimes so held; but it has been since adjudged good.

Thirdly, That in London the Venue usually comes out of the Ward; but there the Custom makes it good, here the Ward is intended lesser than the Vill. As Wild said a Case was, not long since. A Perjury was laid apud Whitehall in Parochia Sanctæ Margarette Westm', the Venue came out of the Parish, and held it to be ill; for Whitehall was intended to be a Vill, and less than the Parish.

Wildman *versus* Norton.

In a Repl the Defendant pleads in Bar Property to the Defendant, and not to the Plaintiff. Upon which it was Demurred, as supposing it amounted to the General Issue, as in Trespas such a Plea doth, 27 H.8.21.

Hale. This Matter may be pleaded in Abatement, or in Bar. The General Issue in Repl is, Non cepit; and if the Issue be Non cepit, Property cannot be given in Evidence: But if the Defendant pleads Property in a Stranger, then 'tis proper to conclude in Abatement. But the Difficulty in this case is, That the Defendant should regularly have claimed Property in the Country, and then the Sheriff could not have delivered them, but the Plaintiff must have brought his Writ de Proprietar' proband': But this Plea serves as an Avowry, and the Defendant shall have a Return, 39 H.6.35.

B k

Note,

Note. It was said, that if one Distraints for a Rent, and before the Avowry, the Estate upon which 'tis reserved determines; the Avowry shall be as if the Estate had continued, for the Avowant is to have the Rent notwithstanding. But if the Distress were for a Personal Service, then the Defendant must have a Special Justification; for he cannot have that Service in specie when the Estate is determined.

The Case of Captain C.

A Captain of a Company in Colonel Russel's Regiment of Foot Guards, and a Serjeant of his Company, were brought into Court upon the Prosecution of the Sheriffs and other Citizens of London; and the Offence alledged and moved against them was this: That one Danbert, a Butcher and Freeman of London, (who had Broke) having Listed himself a Souldier in this Company, and being afterwards Arrested in London for Debt, and laid in the Counter; and thereof he having given the Captain private Notice, the following Design was resolved and executed for his Rescue, (viz.) There being a Priviledge belonging to the Freemen of London, that they may by a Customary Precept or Warrant, (called a *Duci facias*, but by the Common People called a *Horse*) remove themselves from any other Prison (where they are) in London, to Ludgate, where it seems they have better Accommodation, (there being Maintenance allowed to the Prisoners of that place.) Such an one Danbert got, and gave Notice to the Captain, at what time he should be carried from the Counter to Ludgate thereby. Before this time the Captain commanded this Serjeant to take twenty or thirty Soldiers with him, and lay the Prisoner, and Rescue him from the Bayliffs and Officers of the Counter, as they were bringing him along. Accordingly the Serjeant and Soldiers went, and lay in or near an Alehouse about Popes-head Alley in Ambuscade till the Prisoner should be brought by: And when they had Notice from one (who they had placed as Centinel) that he was coming, they sallied out and drew their Swords; (for the Serjeant had given them order so to do, and if any opposition were made they should kill the first Man :) And by this means they Rescued him and carried him away.

Hereupon Complaint being made to the Captain: He Answered, That his Soldiers had done well, and he would Justifie it.

The Court asked him, what he had to say in his Justification?

He said, That he did not know the Law; but he ever thought that a Soldier could not be Arrested without leave of his Officer; and that there was an Agreement to that purpose, between the late Lord General and the former Lord Chief Justice, and that he knew

knew one that had done the like thing, and nothing was said to him for it.

Hale Chief Justice, (to whom the rest agreed) said, The more wrong has been done. It seems you are grown very Head-strong; but you ought to know, that every Officer and Soldier is as liable to be Arrested, as a Tradesman or any other person whatsoever; and you ought to give full Obedience to the King's Commands; signified by his Writs or Process.

Wild said, That that may be served upon you, when you are in the Head of your Company.

Hale said further. You are the Kings Servants, and intended for his Defence against his Enemies, and to preserve the Peace of the Kingdom; not to exempt your self from the Authority of the Laws. And indeed it were a vain thing to talk of Courts and Laws, if Military Men shall thus give the Law, and controul Proceedings: And for that Agreement you speak of, I know nothing of it; and if there were any such thing, it could be nothing but a Civility. Whatev'er you Military Men think, you shall find that you are under the Civil Jurisdiction, and you but gnaw a File, you will break your Teeth ere you shall prevail against it. This is an Outragious Offence, and the Punishment has formerly gone high. Men have heretofore lost their Heads for Matters of such nature; and one of the Crimes of the late London Apprentices was the breaking of Prisons, and delivering of Prisoners; for which they had Judgment of High Treason by the Advice of all the Judges. The Captain and Serjeant were Committed to Newgate: and being brought up at another time, Hale asked, Why an Information against these Persons was not Exhibited? And told the City Counsel, that if the Sheriffs did not prosecute this business, they (the Court) would Prosecute them; for this was a matter of great Example, and ought not to be smothered: And further said, If that Men will take upon them to Rescue all Soldiers that are Committed, it may be within the reach of High Treason; because of the Universality of the Design against the King's Authority: But this being but for one particular, it cannot be Treason; but 'tis a rank Misdemeanour. And he Ordered, that as many of the rest of the Soldiers should be Prosecuted as their Names could be learned. There must be one more to make a Riot, tho' however 'tis a Misdemeanour.

Wild said, Tho' they cannot find out another Name; yet if it be set forth, and made out that there were others, 'tis enough to make a Riot.

Termino Sancti Hillarij, Anno 25 & 26 Car. II.
In Banco Regis.

Note, When a Prohibition is moved for, that a Copy of the Libel is sent to be delivered: The Court requires that Daty should be made of the Denial, and the Prohibition is but quousque a Copy be delivered.

Anonymus.

An Indebitar' Assumpsit was brought for Money Lent. The Defendant pleads a Tender, (which being offered at first, before Action brought, and acknowledged by the Plaintiff, he can never recover any Costs.)

The Plaintiff Replies, That before the Tender he brought an Assumpsit in the Sheriffs Court, upon a Plaint upon the same Cause of Action, which was removed hither.

The Defendant Replies, that upon that Plaint he declared for a greater Sum.

To which the Plaintiff Demurred: For tho' there be a Variance in the Sum; yet it might be averred to be the same Cause of Action. And so the Court agreed.

And Hale put this Case: A. in Consideration that B. would marry his Daughter promised to pay 100 l. and in an Action brought, the Plaintiff was barred; and in another Action brought, The Promise was said to pay the 100 l. at Request, and held it could not be averred to be the same.

Anonymus.

Note, Where Error is assigned in a Matter contrary to the Record, in nullo est Erratum is a Demurrer. So where Matter of Fact is insufficiently alledged.

But if a Matter of Law and Matter of Fact together (well set forth) be assigned (which ought not to be) there in nullo est Erratum will be a Confession of the Matter of Fact, and not serve as a Demurrer for the Doubtfulness: Wherefore, in that case the Defendant must Demur.

Anonymus.

One having Rent payable Half yearly for a Term, whereof about six years were to come, was content to Release it upon a Bond Conditioned for the payment of the like Sum, with the Rent, and at the same times. And in Debt upon the Bond after failure

failure of Payment, upon a Reference to the Secondary to state what was really due. He asked the Opinion of the Court, whether there should be any deduction for Taxes? And the Court said, it was Equitable; they should be allowed, in regard the Money in the Condition was intended between the Parties, to be but in lieu of the Rent, which should have been chargeable with that Assessment.

Anonymus.

In an Action upon the Statute of the 13th of this King, which imposes 6s. and 8d. Penalty upon any one that shall print another's Copy, whereof he hath made due Entry in the Register Book of the Company of Stationers, without License of the Proprietor. It was set forth, that the Defendant had printed One thousand parts of a Book, called The Young Clerk's Guide, after that the Plaintiff had made an Entry thereof in the Register Book of the Company of Stationers. After a Verdict for the Plaintiff, as to One Book, which was all the Plaintiff could prove printed since the late Act of General Pardon.

It was moved in Arrest of Judgment, that the Plaintiff did not shew himself to be Proprietor of the Book before he made the Entry. Sed non allocatur: For the Statute gives the Action to him that has made an Entry in the Register Book.

Secondly, It was Objected, that the Plaintiff ought to have no Costs in this Action. But for that the Court said, the Plaintiff might release them. But it was to be considered whether the Costs were well given or no?

Hedgeborough versus Rosenden.

In Debt for 100 l. the Plaintiff Declared upon Articles of Agreement, purporting that the Plaintiff and Defendant should Run an Horse for 100 l. and if the Defendant lost, that he should pay the 100 l. &c.

The Defendant pleaded the Statute of this King, concerning Gaming, which provides that all Securities given for Money lost at Play, exceeding 100 l. shall be void. And sets forth, that in the Articles it was further agreed, that the Plaintiff and Defendant should Run two, three or four Hears more at 20 l. a Heat, if the Plaintiff required it; so that the whole amounted to more than 100 l.

Holt Argued for the Plaintiff.

First, The Statute (as appears by the words) intended to avoid Securities given for Money lost at Play; but not where the Contract is precedent: For tho' men, when they have lost their Money, are very rash in venturing further; yet what is done before they enter

enter into play may be supposed to be done considerately: Sed non allocatur, for that Construction would wholly elude the Statute, and let Men loose to play for any great Sum, provided they secured it before-hand.

Secondly, It was objected, that the Statute did not intend to avoid the security, when there was but 100 l. lost at a time, and it does not appear here that the Plaintiff requested the Defendant to play any further: Sed non allocatur, for the bargain being to play for more than 100 l. 'tis void ab initio; and tho' the Plaintiff did not request the Defendant, 'tis not material no more than if one should contract for more interest than the Statute allows, if the Creditor requests it, tho' he never requests, yet 'tis within the Statute of Usury; and the Court said, they would extend this Statute as largely as might be in suppressing of Gaming, which was so mischievous.

Monfieur Bellew, Norman Senior and Norman Junior.

Three Frenchmen were indicted of Treason, in Coyning and Clipping the Kings Money, by two several Indictments; and the Court doubted, whether Judgment for the Clipping should be Drawing, Hanging and Quartering, or Drawing and Hanging only; and having advised with all the Judges at Serjants Inn, they resolved, it should be Drawing and Hanging only, tho' the Presidents are both ways. And the Opinion of Coke 3 Inst. 17. is, that a Clipper should be Drawn Hanged and Quartered. But in regard the Statute of 3 H. 5. declared Clipping and Diminishing the Kings Coyn to be within the Statute of the 25 E. 3. which mentions Coyning only; that does not stand repealed by 1 Mar. that leaves all Treasons within the Statute of the 25 E. 5. as they were before, and so 1 Eliz. against Coyning makes not a new Treason. And then, as Hale said, Coyning was esteemed as an inferiour sort of Treason, in comparison of such as concerned the Kings Person; wherefore, there was Drawing and Hanging only for that, and then by the same reason for Clipping, which seems a less degree of the same kind of Treason.

Then there was debate, whether Twisden being the antient Judge or the Chief Justice, should pronounce the Judgment.

Twisden said, in case of Treason it belonged to the Chief Justice, tho' not in Felonies; and that the Lord Foster did it in Sir Henry Vanes Case, in the 13 of this King.

Hale, thought the other was to do it; and therefore Twisden gave the Judgment, ut supra; and to avoid scruple, Hale pronounced it over again.

Baker *versus* Bulstrode.

IN Debe upon a Bond, Conditioned to perform an Award; the question did arise upon one part of the Award, (*viz.*) That the Defendant should Seal and Execute such a Release to the Plaintiff, as should be to the satisfaction of the Plaintiffs Counsel within the space of seven days, and which of the Parties was to tender the Release was the question. And it was resolved, that the tender ought to come on the Defendants side, and not like the Case where such Deed, &c. is to be made, as the Counsel for the other Party shall advise, for the Deed must be offered according as the Counsel does advise, and he to whom 'tis to be made is to do the first Act; but the words here are of another import, *vid.* Lambs Case, 5 Co. 23. 13.

It was held by the Court, that a Writ of Error that bears Teste before the Judgment given, is good to remove the Record, so as Judgment be given before the Return of it: And Hale said, that about three years since at Norfolk Assizes, the Defendant in an Indictment of Barrettry, brought a Writ of Error Teste before the Assizes; and it was disallowed, because if such practice should obtain, it would disappoint all the Proceedings at the Assizes. And if the Plaintiff does not shew his Writ of Error to the other Party, or get it allowed by the Clerk, (by Endorsing Recipitur upon it) within four days, (which time the Court gives, as convenient time for putting in of Bayl according to the Statute) the Writ of Error is no Superedeas. Also, if before the Writ of Error the Sheriff Returns Fieri feci, and non inveni emptores, the Execution is not to be undone.

Termino

Termino *Paschæ*, Anno 26 *Car. II.*
In Banco Regis.

Anonymus.

In an Assault and Battery, the Case upon the Evidence was this. The Defendant drew a Sword, and waved it in a menacing manner against the Plaintiff, but did not touch him, so the Jury were ordered to find him Guilty as to the Assault, but not of the Battery. And the Opinion of the Court was, that the Plaintiff was to have no more Costs than Damages; for the new Act excepts Actions of Assault and Battery, so that both must be proved.

Anonymus.

If a Parish, &c. be indicted for not repairing of a Way within their Precinct, they cannot plead Not guilty, and give in Evidence that another by Prescription or Tenure ought to repair it; for they are chargeable de communi Jure, and if they would discharge themselves by laying it elsewhere, it must be pleaded.

Error.

Error to Reverse a Judgment in Debt upon a Bond given in Norwich Court, where by the Custom, the plea of the Defendant was, quod non dedicit factum, sed petit quod inquiratur de debito.

First, It was moved to be Error, for that the Venire was XII Men, &c. in figures; Sed non allocatur, for being in these letters XII and not in the figures 12. It was well enough.

Secondly, It was ad triandum exitum; whereas there was no Issue joyned, wherefore it ought to have been ad inquirend' de debito, &c. Sed non allocatur, for the Presidents are as the Case is here.

Thirdly, The Condition of the Bond was to pay at Alborough, and that ought to have been shewn to be within the Jurisdiction of the Court: Sed non allocatur, for the Plea here is not payment, secund' formam Conditionis, but the Jury is to inquire by the custom of all manner of payments and discharges.

Fourthly, In the Record it was continued over to several Courts, and in the Court where the Judgment is given, 'tis said in Curia prædicta, and so incertain which; but notwithstanding these matters, the Judgment was affirmed.

Anonymus.

Anonymus.

The Case upon Evidence at a Tryal in Ejectment was this; a Dean and Chapter having a right to certain Land, but being out of Possession, Sealed a Lease with a Letter of Attorney, to deliver it upon the Land, which was done accordingly, and held to be a good Lease, for tho' the putting the Seal of a Corporation aggregate to a Deed, carries with it a delivery; yet the Letter of Attorney to deliver it upon the Land, shall suspend the operation of it while then.

Tenant for Life being in Debt, to defraud his Creditors, commits a Forfeiture, to the end that he in Reversion may enter, who is made privy to the contrivance. The Opinion of Hale was, that the Creditors should avoid this, as well as any fraudulent Conveyance.

Anonymus.

In an Ejectment upon a Tryal at Bar for Lands in antient Demesne, there was shewn a Recovery in the Court of antient Demesne, to cut off an Entail which had been suffered a long time since, and the Possession had gone accordingly. But there was now objected against it,

First, That no sufficient Evidence of it appeared, because the Recovery it self, nor a Copy of it was shewn, for in truth it was lost. But the Court did admit other proof of it to be sufficient; and said, if a Record be lost, it may be proved to a Jury by Testimony, as the Decree in H. 8. time for Tythe in London is lost; yet it hath been often allowed that there was one.

Secondly, It appeared that part of the Land was leased for Life, and the Recovery with a single Voucher was suffered by him in Reversion, and so no Tenant to the Præcipe for those Lands: But in regard the Possession had followed it for so long time; the Court said they would presume a Surrender, as in an Appropriation of great Antiquity, there has been presumed a Licence tho' none appeared.

Thirdly, It was objected, That the Tenant in Tail which suffered the Recovery having first accepted of a Fine sur Conusans de droit come ceo, his Estate Tail was changed, for he was estopped during his Life, to say that he had any other Estate than Fee; then he being made Tenant to the Præcipe, the Recovery was not of the Estate Tail, and so should not bind. But the Court held clearly, that the acceptance of this Fine made no alteration of his Estate. If Tenant for Life accepts such a Fine 'tis a Forfeiture, because

he admits the Reversion to be in a Stranger, but it does not change his Estate; so where two Joynt tenants in Fee accept a Fine, which is to the Heirs of one of them, yet they continue Joynt tenants in Fee as they were before.

Fourthly, The Writ of Right Close did express the Land to lie in such a Mannor; and a Præcipe that demands Land ought to mention the Vill in which they lie, for a Præcipe of Land in Parochia or in Manerio is not good. But this exception was disallowed by the Court, for Hale said the Writ of Right Close is directed Ballivis Manerij, &c. quod plenum rectum teneant of the Land with, in the Precinct of the Mannor, and it is not to be resembled to another Præcipe. But if a Præcipe be faulty in that Point, unless exception be taken to it in Abatement it cannot be assigned for Error; but if it were Erroneous, the Recovery would bind until reversed.

Note, After Judgment quod computet, tho' it be not the final Judgment; yet no motion is to be admitted in Arrest of Judgment, and after such Judgment a Scire facias lies against the Executor of the Defendant.

Note, In an Action of Debt against the Lessee he may plead nil debet, and give the expulsion in Evidence.

Anonymus.

In an Assumpsit the consideration appeared to be, that the Defendant promised to pay a Sum of Money which he owed, this is no good consideration tho' after a Verdict, unless it appeared, that the Debt was become remediless by the Statute of Limitations; but payment of a Debt without Suit is a good consideration.

Anonymus.

A Justice of the Peace brought an Action of Slander, for that the Defendant said, He was not worth a Groat, and that he was gone to the Dogs; and upon motion in Arrest of Judgment, notwithstanding that it was urged to maintain it, that the Statute of H. 6. requires that a Justice of Peace should have 40 l. a year: And therefore, in regard an Estate was necessary to his Office, that the Action would lie; yet the Judgment was stayed, for such words will not bear an Action, unless the person of whom they are spoken, lives by buying and selling.

Anonymus.

Anonymus.

IT was returned upon Elegit, that the Sheriff had delivered medietatem Terrar' & Tenementorum in extent; and after the Filing and Entry of it upon the Record, the Plaintiff moved to quash it, because it was insufficient, for the Sheriff ought upon such Execution to deliver the Possession by Metes and Bounds.

Wild held, that it being entered upon the Record, there was no avoiding of it but by Writ of Error. But Hale held, that in regard it appeared by the Record to be void, it might be quashed, as if upon an Ejectment to recover Possession, upon such a return it appears upon the Evidence, that there was more than the half the Land delivered, this shall be avoided. So if a Fieri facias be not warranted by the Judgment upon which it is awarded, tho' the Sheriff shall be excused, yet 'tis merely void as to the Party. Ec. Ad joratur.

Norton *versus* Harvey.

The Case was, an Executor being possessed of a Term, let part of it, reserving a Rent, and died. And the Question was, whether his Executor should have the Rent of the Administrator, de bonis non.

It was argued for the Executor, that this Rent is merely due by the Contract, and not incident to the Reversion, and the Administrator is in Paramount, it being now as if the Testator had died intestate; and therefore, before the Statute of this King, such Administrators could not have had a Scire facias upon a Judgment obtained by the Executor; tho' in the Case of Cleve and Vere, 3 Cro. 450, 457. 'tis held, that he may have a Liberate where the Executor had proceeded in the Execution of a Statute, so far as an Extent, for there the thing is executed, and not merely Executory as a Judgment. If a Man that hath a Term in the right of his Wife, lets part of it, reserving a Rent, the Wife surviving shall not have the Rent: On the other side it was said, that this case differed from that, because the Reservation here is by him, that had the whole Right executed in him.

Another objection against the Action was, that here in the Declaration being in Covenant for Non payment of Rent, there is not any demand alledged. But that was answered, because the Covenant was to pay such a Sum for the Rent expressly; but if the Condition of a Bond be for performance of Covenants expressed in such a Lease, one of which is for payment of Rent, in that case the Bond will not be forfeit without a demand; and of that Opinion were the Court, and that the Executor should have

the Rent, but when recovered Hale said, it should be Asses in his Hands. And accordingly Judgment was given for the Plaintiff.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

Silly *versus* Silly.

DOwer of 300 Acres of Land, 100 Acres of Pasture, 100 Acres Meadow. The Tenant pleaded Non Tenure.

The Jury found him Tenant as to 320 Acres of Land, and as to the rest that he was not Tenant: And the Judgment was, that the Demandant should recover the 320 Acres.

Error was assigned in this Court, that the Verdict and Judgment were for more Acres of Land than were demanded. But on the other side it was said, Land was a general word, and might include Meadow and Pasture.

Curia, In a Grant Land will extend to Meadow, Pasture, &c. but in Pleading it signifies Arable only, and here in regard they are distinguished in the Count, the Verdict and Judgment must be reversed for the whole. Tho' Hale said, antiently such Judgment would have been reversed but for the surplusage. Vid Post.

Batmore & Uxor *versus* Graves.

TROVER for a 100 Loads of Wood, upon a Special Verdict the Case was, this Copyhold Land was surrendered to the use of J. S. for years, Remainder to the Brother of the Plaintiff's Wife, who died before the Term expired; and so was not admitted any otherwise, than by the admission of the Tenant for years. And it was resolved,

First, That the admittance of him, that had the Estate for years, was an admittance for him in the Remainder, 4 Co. 23 a. 3 Cro. 504. Fine sur Grant and render to A. for Life, Remainder to B. Execution, sued by A. serves for B. So an Attornment to Tenant for Life serves for him in Remainder, and this brings no prejudice to the Lord; for a Fine is not due until after admittance; and the Lord may Asses one Fine for the particular Estate, and another Fine for the Remainder. But Wild said, he need not pay it until his Estate comes in Possession; after a Surrender the Estate remains

mains in the Surrender before admittance of the Cestuy quo use; yet where Borough English Land was Surrendered to the use of J. S. and his Heirs, and he died before admittance, It was held, that the younger Son should have it.

Secondly, It was resolved, that the Possession of the Tenant for years was so the Possession of him in Remainder, as to make a Possessio Fratrís. But then it was moved, that the Conversion was laid after the Marriage, and so the Feme ought not to have joyned with her Husband in the Action. But the Court held, that in regard the Trover was laid to be before the Marriage, which was the inception of the cause of Action, the Wife might be joyned; as if one has the Custody of a Womans Goods, and afterwards Marries, her she may joyn in Detinue with her Husband; for in case of Bailment the Proprietor is to some purposes in Possession, and to some out of Possession. Hale said, in this case the Husband might bring the Action alone, or jointly with his Wife; And so Judgment was given for the Plaintiff.

Anonymus.

In Debt upon a Bond, the Condition was to save the Oblige harmless, from another Bond.

The Defendant pleaded, Non damnificatus.

The Plaintiff replies, that the Money was not paid at the day, and he devenit onerabilis, and could not attend his business for fear of an Arrest.

The Defendant rejoins, that he tendered the Money at the day, absque hoc, that the Plaintiff devenit onerabilis; to which it was Demurred, and the Judgment was given for the Plaintiff, for the Money not being paid at the day, the Counter Bond is forfeited, 5 Co. and the Traverse in this case is naught.

Vid. 1 Cro:
672.

The Mayor and Commonalty of London *versus* Dupester.

In Debt for a Duty, accruing to the City for Timber imported called Scavage. The Declaration was, that they were and had been a Corporation time out of mind, and their Customs were confirmed by Act of Parliament Temps R. 2. &c.

The Defendant tendered his Law, and Co. Entries 118. was cited; where in Debt for an Amerciament in a Court Baron, tho' the imposing of it was grounded upon a Prescription; yet, Wager of Law was admitted. But notwithstanding, in this case the Court overruled the Wager of Law; for here the Duty it self is by Prescription, and that confirmed by Act of Parliament: Debt for a Duty growing by a By-Law, if the By-Law be Authorized by Letters Patents, no Wager of Law lies: So in Debt for Toll granted by Letters Patents, 20 H. 7.

Tetmimó

Termino Sancti Michaelis, Anno 26 Car. II.

In Banco Regis.

Silly *versus* Silly.

The Case was moved again: And the Court said, that the Demandant might have taken Judgment for the 300 Acres only, habito nullo respectu to the rest, and released all the Damages: But this was not proper for an Amendment the Mistake being in the Verdict; but if it could have been amended in the Common Bench, the Court might here have made such Amendment. Ante.

Burfoot *versus* Peal.

A Scire facias was brought against the Bail, who pleaded, that the Principal paid the Debt ante diem impetrationis Brevis. Upon which it was Demurred.

Jones, Solicitor, for the Defendant, said, Tho' the Bail may plead payment, because the Condition of the Recognizance is in the Disjunctive, (*viz.*) for rendring the Body, or paying the Money: yet the Principal cannot. Also it ought to have been pleaded, to be paid before a Capias ad satisfaciendum taken out; for as it is, it may be after the Recognizance forfeited: As if the Death of the Principal be pleaded, it must be alledged to be before the Capias ad satisfaciendum taken out.

But the Court held it to be well enough: for if that matter be material, 'tis to come on the other side, and ex gratia Curiae the Bail has time to save himself before the Return of the second Scire facias.

Anonymus.

In an Assumpsit the Plaintiff Declared, that on the 28th of June (Discoursing with the Defendant about the Marriage of his Daughter) the Defendant promised him, That if he would hasten the Marriage, and should have a Son within Twelve Months then next following, he would give him an Hundred Pound: And sets forth, That he did Marry soon after, and had a Son within 12 Months after the Marriage.

Upon non Assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff had not set forth, That he had a Son within the time; for then next following shall

shall be referred to the Day of the Discourse, and not to the Marriage.

But the Court were of another Opinion, and gave Judgment for the Plaintiff.

Crawfoot versus Dale.

In an Action for Words, it was thus: There being a Discourse of the Plaintiffs Trade, the Defendant said, He was a cheating Knave, and kept a false Debt-Book, with which he cheated the Country.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that to say a Tradesman was a Cheating Knave, tho' there were a Colloquium of his Trade, was not Actionable; for that might be said, because he sold too Dear, and so cheated in the Price; but to say, that He sold bad Commodities, is Actionable; and to say, He kept a False Book, will not bear an Action, for that may be unwittingly.

But the Court Resolved, that the Words said together were Actionable; for Tradesmens Books are of much regard, and sometimes given in Evidence.

Jennings versus Hunking.

In an Action for saying, He was Perjured, the Declaration was laid in Devonshire.

The Defendant Justified; for that the Plaintiff made a false Affidavit at Launceston in Cornwall, and Issue was taken upon that, and tryed at the Assizes in Devonshire, and moved that this was a Mistrial.

But it was Answered, That the Statute of 17 Car. 2. cap. 8. helps all Mistrials, so as the Trial be in the County where the Action is brought. And a Case was cited in this Court between Croffe and Winton in the 21 Car. 2. where an Action was brought for saying, He stole Plate from Wadham Colledge in Oxford. The Defendant Justified, that he did Steal there. Upon which there was Issue joyned, and tryed in London, where the Action was brought, and it was held good. And this Term a Case was moved in the Common Bench in a Writ of Covenant against Wise: The Defendant pleaded a Feoffment of Lands in Oxfordshire, and the Issue was non feoffavit, and afterwards tryed in London, where the Action was laid; and the Opinion of the Court there was, that the late Statute would help it.

The Court said, It was within the words of the Act, but (as they conceived) not within the meaning; for they intended only, so the Trial was in the County where the Issue did arise. But in regard of the Resolutions before, they would not stay Judgment.

Anonymus.

Anonymus.

In an Action upon the Case the Plaintiff sets forth, that the Defendant malitiosè crimen Feloniæ ei imposuit, and not mentioned any Felony in particular; and yet held to be well enough.

Anonymus.

Trespas with a Continuando, which was alledged for some time after the Term wherein the Action was brought, and Damages given to 10 l.

It was moved in Arrest of Judgment, that for part of th Trespas it appears by the Plaintiffs own shewing, that the Action was brought before the Plaintiff had Cause of Action. And it was said, That if the Bill were filed at the End of the Term, and the Trespas reached to some time within the Term, the Filing should not relate so as to make it Insufficient: But here it was carried to the 3d of July, which the Court must see is out of the Term; because they take Cognizance of the beginning and end of every Term.

Anonymus.

If an Audita Querela be brought before the Execution of a Judgment quia timet, and it goes for the Defendant; he shall execute his Principal Judgment: But if it be brought after the party is in Execution, and he be bailed out, then the Judgment being once Executed, there can be no after resort to that; but the Defendant shall proceed upon the Record of the Audita Querela.

Fawkener *versus* Annis.

The Privilege of the Chancery was pleaded by way of Prescription, and upon Demurrer it was held naught.

First, Because it was not Concluded, & hoc paratus est verificare: And,

Secondly, No place alledged; for they are Matters of Fact, and Triable.

Anonymus.

In an Action upon the Case the Plaintiff Declared, That the Defendant (the Tenants and Occupiers of such a parcel of Land adjoining to the Plaintiffs) have time out of mind maintained such a Fence; and that from the 23th of April to the 25th of May, & postea, the Fence lay open, and that una Equa of the Plaintiffs went through the Gap, and fell into a Ditch the 28th of

of May, & submersa fuit. Upon Not Guilty pleaded, and found for the Plaintiff, Holt moved in Arrest of Judgment:

First, That the Prescription is laid in Occupiers, and not shewn their Estate; and that hath been adjudged naught in the 1 Cro. 445. and the 2 Cro. 665.

Curia. 'Tis true, there have been Opinions both ways; but 'tis good thus laid, for the Plaintiff is a Stranger and presumed ignorant of the Estate: But otherwise it is if the Defendant had prescribed.

Secondly, It was Objected, That the Cause of Action is laid after the 25th of May, and (for ought appears) the Fence might be good at that time, tho' 'tis said to be open till the 25th of May & postea. Sed non allocatur: For,

1. 'Tis after a Verdict.

2. 'Tis said expressly, that the Beast was lost in defectu fensuræ, and so cannot be intended but that it was down at the time.

Anonymus.

An Indictment of Forcible Entry upon the 8 H. 6. being removed hither by Certiorari, a Restitution was prayed: But to stop that it was said, that the Indictment was traversed; and a Plea, that the party had had three years quiet possession, according to the 31st of Eliz. and tho' Dyer 122 is, That 'tis in the Discretion of the Court to grant Restitution even after a Traverse put in; yet now since the Statute of Eliz. where such Plea is tendered, the Court cannot grant a Restitution, tho' they would in this Case, if by Law they might; for the party that made this Entry had lost the Land just before by Verdict in an Ejectment, and by this means the effect of it should be disappointed.

Note, The Indictment wanted Vi & armis; for it was pacifice intravit & sine Judicio disseisivit, & à possessione expulit & amovit.

But on the other side it was said,

First, That the Entry being pacifice, it was not the course to lay it Vi & armis.

Secondly, That 37 H. 8. cap. 8. supplied the defect of Vi & armis in an Indictment: But as to the latter the Court were of Opinion, that the Statute supplied only the lack of the words gladiis, baculis & cultellis, as are mentioned in the Statute. Vid. the Stat.

Anonymus.

A Suit for a Pension may be in the Ecclesiastical Court, tho' by Prescription; but if it be denied to be time out of mind, then a Prohibition is to go, so that the Prescription may be tried at Law, as in a Modus decimandi, mutatis mutandis.

It was said by the Court, that two might joyn in a Prohibition, tho' the Gravamen was several; but they must sever in their Declarations upon the Attachment.

Termino Sancti *Hilarij*, Anno 26 & 27 Car. II.

In Banco Regis.

Anonymus.

In Error, the Writ was Teste the 30th of November last, and Returnable in Parliament the 13th of April next, the Day to which the Parliament was Prologued. The Defendants Counsel desired the Rule of the Court for the taking out of Execution, supposing this Writ of Error was no Superfedeas; and alledged, that the late Rule made in the House of Lords did not extend to their Case; for that was, That all Causes there depending should not be discontinued by the intervening of a Prorogation; but this Case will not be there depending before the Return of the Writ. In 3 H. 7. 19. the Court of Kings Bench would not allow a Writ of Error into the Parliament, until some Error was shewn to them in the Record, lest it should be brought on purpose to delay Execution. In Bullstrode's Reports, a Writ of Error Returnable the second Return of the Term, was held to be no Superfedeas, because it seemed an affected delay, that it was not made Returnable the first Return.

Hale. It has been taken, that a Prorogation determined a Cause depending in Parliament by a Writ of Error; but the Lords have lately Declared otherwise: But that comes not to this Case, the Writ not being Returned. A Writ of Error Returnable ad proximum Parliamentum, is not good; but otherwise if they are summoned or prologued to a Day certain. If the Day of the Session had been a Year hence, it would be hard a Writ of Error should stay Execution; and the same Reason where the whole Term intervenes. A Writ of Error did bear Teste 10 Nov. and was Returnable 1 Nov. proxime futur; and the Record was sent into the Exchequer Chamber, and a Mittimus Endorsed upon the Roll here: And it was Resolved, that Execution might be taken out because of the long Return.

Secondly: That tho' there were a Mittimus upon the Roll, yet the Record remained here until the Return of the Writ to all purposes.

And

And the Opinion of the Court was, that the Writ of Error was no Superedeas: But they would make no Rule in it, because they said it was not Judicially before them; but the party might take out Execution, if he thought fit: And then if the other Side moved for a Superedeas, they should then Resolve the Point.

Note, Hale said in an Assumpsit for Money, upon the Sale of Goods, upon non Assumpsit the Defendant might give in Evidence an Eviction of the Goods to mitigate the Damage, and in all Assumpsits; tho' upon certain Contracts the Jury may give less Damages than the Debt amounts unto, as he said was done in a Case where a man promised to give a Straw for every Nail in every Horses Shoe, doubling every time; and they gave in Damage; but the Value of the Horse, tho' (as the Bargain was made) it would have come to above 100 l.

Lomax versus Armorer.

A Writ of Error was brought to Reverse a Judgment in Dower, given in the Court of Newcastle.

The Error assigned was; because the Proceeding was by Plaintiff, and no Special Custom certified to maintain it: As in London and Oxford they have Assizes of Fresh Force by Plaintiff.

The Court held it to be Erroneous for this Cause; but would not determine, whether it might not be good upon a Special Custom? 1 Rolls 793. Pl. 11.

Anonymus.

A Mandamus was granted to the Archdeacon of Norwich, to Swear a Churchwarden upon surmize of a Custom, That the Parishioners are to choose the Churchwardens; and that the Archdeacon refused him, notwithstanding that he was Elected according to the Custom.

The Archdeacon Return'd, that non sibi constar, that there is any such Custom (which form is not allowable; for it ought to be positive, whereupon an Action might be grounded) and that by the Canon the Parson is to choose one, &c.

The Court said, that Custom would prevail against the Canon, and a Churchwarden is a Lay Officer, and his Power enlarged by sundry Acts of Parliament, and that it has been Resolved, that he may Execute his Office before he is Sworn, tho' it is convenient he should be Sworn; and if the Plaintiff here were Sworn by a Mandate from this Court, they advised him to take heed of disturbing him, Noy Rep. 139.

¶ m 2

Anonymus

Anonymus.

Assumpsit was brought against an Executor; for that the Testator being Indebted to the Plaintiff, he did ad requisitionem of the Defendant come to Account with him, upon which there appeared to be so much due to the Plaintiff, which he promised to pay.

After Verdict the Judgment was de bonis propriis, and it was moved, that it ought to have been de bonis testatoris: for the Accounting with him is little more than telling him what is due, and this might make an Executor afraid of Reckoning with any of his Testators Creditors.

The Court said, that the Accounting upon the Defendants Request, (which was more than the Plaintiff was bound to have done) was a Consideration, and after a Verdict they must intend an express Promise.

But Hale said, If upon the Evidence it had appeared that there was no Intention to alter the Nature of the Debt, (as in case, an Executor should say, stay a while until the Testators Estate was come in, and I will pay you,) he should direct the Jury to find against the Plaintiff, that would in such case charge an Executor in his own Right.

Termino Paschæ, Anno 27 Car. II.

In Banco Regis.

Note, In an Indebitatus Assumpsit a man Promises in Consideration, that one (to whom the Promise was made) would marry his Kinswoman, he would give her 100 l. It was adjudged that an Indebitatus will not lie; for tis not a Debt, but a Collateral Promise.

Best versus Yates.

In an Action upon the Case the Plaintiff declared, That the Defendant being a Taylor, he retained him to make him a Coat well and artificially, and that the Defendant maliciously intending to abuse and damnify the Plaintiff, made it tam ineptè negligenter & inartificialiter, that it became of no value or use to him, to his damage 20 l. To this Declaration the Defendant Demurred.

First,

First, For that he saies he retained him, and does not shew that he delivered him any Materials, so that the Action might lie for spoiling of them; but this amounts to no more than that he bespoke a Garment, which when it was made he did not like, and so might have refused it, therefore there does not appear to be any Damage. Vid. The president in Astons. Entries fol. 12.

Secondly, He does not shew wherein he had spoiled the Coar, or what defect there was in it, and this ought to have been certainly set forth. And of this Opinion were the Court, and Judgment was given quod querens nil capiat per billam.

James *versus* Peirce.

IN an Action of Debt for an Escape, upon Nil debet, a Special Verdict was found to this effect, (*viz.*) That the Plaintiff recovered 700 l. Debt against J. S. who was thereupon committed in Execution to the Fleet, and afterwards the Warden permitted him to make a voluntary Escape, after which he returned again to the Fleet, and the Defendant was made Warden in the place of the other, and J. S. being then in the Fleet was turned over with the other Prisoners, and afterwards suffered to Escape. So that the question was, Whether he were so in Execution upon his return, as the escape in the now Wardens time should Intitle the Plaintiff to the Action. It was principally insisted on against the Action, that there being once an Escape, that the party could not be in Execution again without new Process.

Hale said formerly it was held, even in the case of a Permissive Escape, that if the party were taken again, he might discharge himself by Audita Querela, and that he might not be retaken unless in case of a voluntary Escape; but there the remedy was only against the Gaoler. But afterwards it was held, that Debt would lie against the party who escaped, because the Duty they did not suppose was discharged by the Escape: But they held it was a good Plea to a Scire facias. But afterwards, 9 Car. between the Lord Roberts and Trevilian, The Opinion of the whole Court was, that a Scire facias quare Executionem habere non debet would lie against one that had made a voluntary Escape; and there is no reason, but that he may as well be taken by the party again without a Scire facias, for the Party has an Interest in the Body of the pledge, until his Debt is satisfied; Tho' if the Prisoner should bring Trespass against a Gaoler, that detained him after a voluntary Escape, he could not defend it; the mischief would be exceeding, if the Sheriff, &c. might at his pleasure put the Plaintiff to an Action only against himself. For this last Vacation, the Warden of the Fleet turned as many Prisoners at large, as their Debts came to 80000 l. and ran away himself: And so by the Opinion of the whole Court (absente Twissden) Judgment was given

given for the Plaintiff. Vid. Hob. *The Sheriff of Essex's Case*; which was denied to be Law.

Sir Thomas Littleton Case.

DEbt was brought against him, by one that Entitled himself by Assignment of Commissioners of Bankrupts. Upon the Evidence it appeared, That he with two others had covenanted with the King, to provide Victuals for the Seamen that served in the late Dutch War at 8 d. per Man; and after this they made a bargain with the Purser of the Ships, to provide for such as served in their Ships, at other Rates agreed upon between them. The Victuallers, afterwards falling into the Kings displeasure, and being thereupon removed from their Employment, and having a great Sum of Money due from the King to them upon the Contract aforesaid, refused to pay the Purser, supposing notwithstanding their Contract, that they were not Debtors, being upon the Kings Account until such time as their Accounts with the King were allowed and so was said, was the usage of the Navy Board, whereupon a Commission of Bankrupt issued forth. But the Court, (*viz.*) Hale, Rainsford and Wild, were clear of Opinion, That this Employment in buying up Stores for Victualling the Fleet did not make the Victuallers Traders, nor was it buying and selling within the Statute of Bankrupts. And Hale said, that every Purveyor might as well be made a Trader, or Schoolmaster, that keeps Boarders in his House; and tho' it were shewn to enforce the matter that where there was a Redundancy of Provisions, they used to Victual Merchantmen; but in regard it was originally designed for the use of the Navy, in pursuance of their Contract with the King, they might well dispose of the Surplus to any other use: And then it was shewn, that they Victualled the French Fleet also, and that was more than was contained in their first Agreement with the King; but that being proved to be done by the Kings express order (tho' that Order was not produced.) The Court held, that it was not sufficient evidence to prove them Traders. But Hale said, they having made a Contract with the King to provide for the Fleet at so much a Head, the King was not chargeable to those with whom they contracted; and therefore, that Contract with the Purser of the Ships would make them Debtors to them. But upon the other matter, they directed the Jury to find for the Defendant.

Termino

Termino Sanctæ Trinitatis, Anno 27 Car. II.

In Banco Regis.

Motteram *versus* Jolly.

In Debe upon a Bond Conditioned to perform Covenants in an Indenture; one of which was, that the Defendant Covenanted with the Plaintiff, that the Plaintiff should elect 20 of the best Trees out of his Wood, to be taken within 11 years, and the breach was assigned, that the Defendant had cut Trees within the time, upon which it was Demurren, and relied upon Sir Thomas Palmers Cases, 5 Co. where Sir T. P. sold 2000 Cords of Wood, to be taken at the Election of the Vendee. And there it is said, if the Vendor cuts the Wood before the Vendee hath elected, the Vendee cannot meddle with that which is cut, but must supply his bargain out of the residue: But here the Court were of Opinion for the Plaintiff, for by the Covenant he hath 11 years time to elect, and by cutting any Trees in the mean time, the Latitude of his Election is abridged. And Hale said, for the case in 5 Co. there if the Grantee can have the number of his Cords of Wood, he hath the effect of his Grant; But Trees differ in value exceedingly from each other.

Bolton *versus* Cannon.

In Debe against an Executor for Rent, Arrears in his own time in the debet & detinet.

The Defendant pleads, that the Rent is more worth than the Land, and that he tendered a Surrender before the time for which the Rent is demanded; and that the Plaintiff refused to accept the Surrender, and that he had fully administered, and so demands Judgment of the Action.

The Plaintiff replies, that there was Rent Arrear to him, and that therefore he was not bound to accept of the Surrender, and to this the Defendant Demurs. The Court said,

First, That an Executor that does intermeddle cannot waive a Lease, or any other part of the Testators Estate, for he cannot assume the Executorship for part, and refuse for part.

Secondly, That in case the Land be not more worth than the Rent, it is a good Plea to an Action of Debe in the debet and detinet, for he is to be charged in the detinet only; tho' where the Rent is of less value, he may be charged in the debet & detinet for that

that which is accrued in his own time, according to Hargraves Case, 5 Co.

Thirdly, The doubt here is, that the Defendant having waived the material part of his Plea, (*viz.*) That the Rent exceeded the value of the Land, and relied upon his tender of a Surrender, which is nothing to the purpose, whether Judgment can be here for him, and that otherwise his Plea is double; but because the Plaintiff hath not demurred to that, but answered only to one part of it, the Defendant might well Demurr upon the Replication, because it does not answer all contained in the Plea, for unless the party Demurs for doubleness he is bound to answer all the matters alledged. *Ex Adjournatur.* But being this Term moved again, Judgment was given for the Plaintiff, because the Defendant relinquished the material part of his Bar, and offered matter merely frivolous.

Cartwright versus Pinkney.

Tenant for years Surrenders to the Lessor, reserving a Rent; the question was, Whether it was a good Reservation. And held, that it was, upon the Contract, and that Debt lay after the first day was incurred wherein it was reserved to be paid, for it was in the nature of a Rent, and not of a Sum in Gross. *Ante, Wilton and Pinckney.*

Anonymus.

In Trespass for Fishing in his several Fishery, & pisces cepit. After a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff ought to have alledged what kind of Fishes, and the number of them as in *Playters Case*, 5 Co. 18. But for that it was said on the other side, that at that time they were more strict in the certainty of pleading than since, for now an indebitar Assumpsit for Work done, or Goods sold, is allowed without further certainty. And that however the Oxford Act, 15 Car. 2. here helped it; for tho' this be none of the defects there enumerated; yet the words of the Act being, That Judgment shall not be arrested for any other exception that doth not alter the nature of the Action, or Tryal of the Issue, shall extend to this Case. But the Court were of Opinion, that none of the Acts had aided this Case, in regard, that there was not so much as the number of the Fishes expessed; as if a Man should bring Trespass for taking of his Beasts, and not say what. But Hale said, Trover for a Ship cum velis had been allowed, because all made but one aggregate Body, both the Ship and Sails. But Trover pro velis would not be good. *Vid. 2 Cro. 435. Trespass quare clausum fregit & Spinas cepit, and 3 Cro. 553. Child and Greenhills Case.*

Dr.

Dr. Webb *versus* Batchelour. & al^r.

In Trespass for taking so many Cowes; upon Not guilty a Special Verdict was found.

That an Act of this King for repairing of the High-ways appoints, that such persons as keep Carts and Horses, &c. should send them at certain times to assist in the repairing of the Ways, not having a reasonable excuse, and that warning was given to the Parishioners of the Parish, whereof the Plaintiff was Parson to send in their Carts, and that the Plaintiff omitting to do it; a Justice of Peace made a Warrant to the Defendant, to distrain him according to the Authority given by the Act, &c. It was alleged for the Plaintiff.

First, That Clergymen were not obliged by this Act, for Ecclesiastical Persons have always had immunities from such charges, as Pontage, Murage, &c. and shall not be comprehended in the general words Parishioners.

Secondly, That in regard the Act allows an excuse; the Justice of the Peace ought to have caused the Plaintiff to have appeared before him, to have seen whether he had an excuse before he could have made his Warrant; and tho' the Officer that executes the Process of a Court of Record be indemnified, where the proceeding is Exonerous; yet 'tis not so where the proceeding is not of Record, as the 10 Co. in the case of the Marshalsey, 3 Cro. 394. Nicholls *versus* Walker and Carter. Where a Warrant was made by a Justice of the Peace to distrain for a Poors Rate: Trespass was maintained against the Officer that executed the Warrant, because the Plaintiff was not chargeable as an Inhabitant of the Parish, for whose Poor the Rate was made.

Curia contra. 1. The Clergy are liable to all publick charges imposed by Act of Parliament; and that hath been resolved, as Hale said upon debate before all the Judges. 2. The Officer that executes the Warrant (though unduely made for the cause alleged) is not answerable, for he is not to judge, but to execute the matter, it being within the Jurisdiction of the Justice of the Peace; and 'tis not like the Case, in the 3 Cro. for there the Churchwardens And Overseers of one Parish distrained in another Parish, which was out of the limits of their Authority; but in 14 H. 8. 16. where a Justice of the Peace made a Warrant to Arrest a Man for Felony, (which in those times was held beyond his power, tho' otherwise since,) unless there had been some Indictment of Record; yet 'tis there held, the Officer that executes such Warrant is not punishable. Wherefore Judgment was given here for the Defendants.

Termino Sanctæ Michaelis, Anno 27 Car. II.
In Banco Regis.

Anonymus.

A Judgment was removed by Error into this Court, and affirmed, the Capias that is Awarded thereupon must mention it, and not be general as upon a Judgment originally in this Court; and if such a Writ issues out, the Court will upon motion grant a Superfedeas, and there needs no Writ of Error in Adjudicatione Executionis, tho' it was taken out in a former Term.

Anonymus.

Libel was (by the Churchwardens of, &c.) in the Ecclesiastical Court for 1 l 6 s. 8 d. upon a Custom for payment of so much, for being Buried in the Body of the Church; and a Prohibition was prayed, suggesting that there was no such Custom. The Court held such a Custom must be good, because the Parish is to be at the charge to make up the Church Floor; but if the Custom be denied, it must be tried at Law: And therefore inclined, that a Prohibition was to go tho' it was objected, that this duty belongs properly to the Ecclesiastical Court, and no remedy for it elsewhere; for so is the Case of a *modus decimandi*, which may be demanded in the Spiritual Court; but if the Custom be denied, there shall be a Prohibition, and so the case of a Mortuary, since the Statute of H. 8. And it afterwards being moved again, Hale Chief Justice being present, the Prohibition was granted. Which Hale said, was sometimes granted *pro defectu Jurisdictionis*, and sometimes *pro defectu Triationis*, as in this case and others, where the ground of the Suit is Prescription, for in their Law they have sometimes allowed Prescriptions of 20 years, sometimes of 40 years, but we admit none but what are *de temps dont*, &c.

St. John *versus* Moody.

In an Action upon the Case; the Plaintiff declared, That he was possessed of a Wood, and that he had a way leading from such a place to the said Wood, and that the Defendant had obstructed it.

Upon

Upon not Not guilty it was found for the Plaintiff, and moved in Arrest of Judgment, that the Plaintiff had not set forth his Title to the way, whether by Prescription or otherwise, and this ought to be, that the Defendant might be ascertained what to make defence unto: Also, 'tis proper to the nature of an Action upon the Case, to set forth the Case at large.

Curia contra. The Action here is grounded upon the Possession; indeed, if Trespas were brought by the owner of the Soil in a justification for a way, 'tis necessary to express by what right 'tis claimed; but this (for ought appears) may be against a Stranger. In Assize for a Rent against the Terre-tenant he may demand Judgment, whether he ought to answer before Title made; otherwise, of an Assize brought against the Pernor of a Mans Rent. Where 'tis pleaded, that the Party ought to keep the Fence, it sufficeth to say occupatores reparare consueverunt; for in Truth, the greatest part of the Enclosures in England, have been within time of Memory. The Writ of *Curia claudenda*, is only *quod debet & solet*; 'tis true, before 7 Jacobi, the usage has been in Actions of this nature to prescribe, but not since. Vid. 2 Cro. 43, 123, 3 Cro. 499 & 575. Sands and Trefuses Case, and 325, Symonds and Seabourn. Whereupon Judgment was given for Plaintiff.

Note, This Case was afterwards affirmed, upon a Writ of Error in the Exchequer Chamber.

Drue versus Bailly.

The Case was, an Executor had a Term, and let part of it, reserving a Rent, and made his Executor and died. The question was, Whether the Executor should have the Rent or the Administrator *de bonis non*. And it was held, that the Executor should have it.

Bell versus Thatcher.

In Error upon a Judgment given in the Court of Common Pleas, where the Plaintiff in an Action upon the Case declared, That he had been retained by the under Postmaster, to carry about post Letters, of which he made a profit, and had behaved himself honestly in that Employment. And that the Defendant to defame him said, He had broken up Letters, and taken out Bills of Exchange, which brought him to such discredit, that he lost the said Employment. And Judgment was given for the Plaintiff, and Error assigned upon the matter, for that the words do not import, but that he might break open the Letters, by the direction of those to whom they were directed, neither do they express that they were Post Letters, and the innuendo will not help it, unless there had

been such a signification in the words. Neither is it such an Employment that an Action should lie for Scandalizing. Also the Plaintiff does not declare, that he was retained for above a year, and seems to be little more than a Common Porter. And for these reasons, by the Opinion of the Court the Judgment was reversed; and (Hale) principally from the quality of the Employment, for he said a Man should not speak disparagingly of a mans Cook or Groom, but an Action would be brought, if such Actions as these should be maintained.

Anonymus.

In an Action for words, the case was, that the Defendant speaking to the Plaintiff, said thus, I know my self and I know you, I never buggered a Mare; And the Opinion of the Court was, that the words were Actionable, or else there might be sly ways to defame any Man and evade an Action.

Hodgkins *versus* Robson and Thornborow.

In Debt for Rent.

The Defendants pleaded in Bar to the Action, that the Plaintiff had entred into a Back-yard, part of the Land demised, by Force and Arms, &c.

The Plaintiff replied, that he ought not to be foreclosed of his Action, for that the Defendant had let that Back-yard to J.S. for a lesser Term, reserving no Rent; and that J.S. entred, and after assigned unto the Plaintiff, &c. which is the same Entry in the Bar.

The Defendants rejoyns that J. S. did not enter, to which it was demurred: And after it was several times spoken to at the Bar, Judgment was given this Term by the whole Court for the Plaintiff, (*viz.*) Hale Chief Justice, Twissden, Rainsford and Wild. And

First, They all held, that as the pleading was in this case, there could be no Apportionment of the Rent, for when there is to be an Apportionment, either the Jury shall do it upon nil debet pleaded, or the Defendant may in his pleading set forth the value of the Land, and to what the Apportionment shall be. Hale said, if the Lessee redemise part to the Lessor reserving a Rent there shall be no Apportionment, for the parties, by the Reservation have ascertained what Rent shall be allowed for that part; but where there is no Rent reserved upon the Redemise, there shall be an Apportionment; but if part be assigned by the Lessee to a Stranger, who Assigns it to the Lessor, and the Lessee had reserved no Rent, in that case, there shall be no Apportionment, for the Lessor comes under

under the benefit of the Strangers Contract. And Hale resembled it to the Case of Lord and Tenant by an entire Service, if such Tenant aliens part, the Service is multiplied; and after it be conveyed to the Lord, the entire Service still remains upon the Tenant that holds the residue. A Rent upon a Lease is not within the Statute of *Quia emptores terrarum*; yet in many Cases there shall be an apportionment at Common Law. If the Lessor enters into part by Wrong, this shall suspend the whole Rent; for in such case he shall not so apportion his own Wrong, as to enforce the Lessee to pay any thing for the residue. Otherwise of a Rightful Entry into part, as in the Case at Bar. 'Tis true, in *Ascough's Case* in the 9 Co. 'tis said, a Rent cannot be suspended in part, and in esse for part. And so in the 4 Co. *Rawlin's Case*, it is held, That the whole Rent is suspended, where part is Redemised to the Lessor. But the Court observed, that the Resolution of that Point was not necessary to the Judgment given in that Case, which was upon the Extinguishment of the Condition, which is entire, and not to be apportioned: But as to the Rent, no Book was found to warrant such an Opinion, but *Brook, tit. Extinguishment* 48. where 'tis said, If there be Lord and Tenant by three Acres, and the Tenant lets one to the Lord for years, the whole Rent is suspended. This Case is not found in the Book at large. An in 7 Ed. 3. 56, & 57. where a Formedon was brought of a Rent-Service issuing out of three Acres, and as to one Acre it was pleaded, that the Demandant himself was Sole seised, and concluded Judgment of the Writ: But it was Ruled to be a Plea to the Action for so much, and to the rest the Tenant must answer; which is a full Authority, that in such case the Rent is to be apportioned. And the Case of *Dorrell and Andrews*, *Rolls tit. Extinguishment* 938. is full in the Point, That where Lessee for years lets at Will, which Lessee Licenses the Lessor to enter, that the Entry of the Lessor thereupon shall not suspend his Rent. For Hale said, Tho' it might be Objected, that in regard the Lessee at Will cannot lett, the Entry of the Lessor thereupon might be a Disseisin; but that is ever at the Election of the Lessor: And if that were now the Question, perhaps the Lessor cannot take such an Entry for a Disseisin.

It is the Common Experience, that where it comes to be tried upon Nil debet, if it be shewn that the Lessor entered into part to Answer this, by proving it was the Lease of the Lessee; and if the Law should not go upon this difference, it would make abundance of Rents, it being a frequent thing for a Lessor to Hire a Room, or other part of the thing demised, for his Convenience.

Hale said, That a Case of a Lease for years was stronger than a Lease for Life, where the remedy is by Assize, and the Tenants of the Land (out of which the Rent issues) are to be named: And for a Condition, that must be extinct where part of the thing Demised comes to the Lessor, because 'tis annexed to such a Rent in quantity. For if the Rent be diminished, the Condition must fail.

Holland *versus* Ellis.

IN Trespass Quare clausum fregit, herbas concule' & diversas carectat' tritici ibid' asportavit.

After Verdict it was moved in Arrest of Judgment, that the Declaration did not mention whose the Loads of Wheat were; for it was not ibid. crescent'. Adjournatur.

Resolved per Cur', That an Inquisition before the Coroner, taken super visum corporis, that finds that the Person was Felo de se, & non compos mentis, may be traversed: But the fugam fecit in an Inquisition before the Coroner cannot be traversed.

Termino Sancti Hillarij, Anno 27 & 28 Car. II.

In Banco Regis.

The Earl of Leicesters Case.

IN an Ejectment upon a Special Verdict the Case was to this effect:

Robert Earl of Leicester in the . . . of Eliz. levied a Fine of the Lands in question to the use of the Earl of Pembroke and his Heirs, for payment of his Debts, reserving a Power to himself to Revoke by any Writing Indented, or by his last Will, subscribed with his Hand and sealed with his Seal: And sometime after he Covenants by a Writing (Sealed and Subscribed, as aforesaid) to Levy a Fine to other uses, and after the Covenant a Fine was levied accordingly. And whether this should be taken as a Revocation, and so an execution of the Power, and the extinguishment of it, was the Question?

It was Argued by Jones, Attorney General, that this should not be taken as a Revocation.

In Powers of Revocation, there is to be considered the Substance and the Circumstance, and that which Revokes must be defective in neither. The Deed alone in this Case cannot revoke; for tho' it has the Circumstance limited (viz.) Indenting, Writing, Sealing, Subscribing; yet it wants Substance; for it doth nothing in presenti, but refers to a future Act (viz.) the Fine. If a man has made his Will, a Covenant after that he will levy a Fine, or a Charter of Feoffment made, will not be a Revocation of the Will, 1 Roll. 615. yet there appeared an intention to Revoke; and less matter will Revoke a Will than a Deed.

Again, the Fine alone cannot Revoke, because it is defective in the Circumstances contained in the Power; but then to consider them both together, how can it be conceived that the Fine should communicate Substance to the Deed, or the Deed give Circumstances to the Fine?

But 'tis Objected, That they make but one Conveyance.

I Answer. If so, then the words of the Power here are to Revoke by Deed, and not by Deed and Fine.

Again, This Construction is repugnant to the words of the Power, which are, That it shall be lawful for him to Revoke by his Deed: And yet it is agreed here, that the Deed of it self is not sufficient to revoke, but only in respect of another Act done, which (as it must be observed) is executed at another time. The Books agree, that a Condition or Power, &c. may be annexed to an Estate by a distinct Deed from that which conveys the Estate; but not unless both are Sealed and Delivered at the same time, and so they are but as one Deed: But in the present Case, the Deed was made in one year, and the Fine levied in another. Suppose the Power to be with such Circumstances, as in our Case, and a Deed is made which contains some of them at one time, and another Deed comprehending the rest at another time, Should both these make a Revocation as one Deed? Surely not.

Again, Suppose the Fine had been Levied first, and then afterwards such Deed had declared the Uses; surely the Power had been extinguished by the Fine, tho' there the Fine and Deed might be taken as one Conveyance, as well as here.

Again, the different natures of these Instruments makes, that they cannot be taken as one entire Act within the Power; for the Covenant is the Act of the party, and the Fine the Act of Judgment of the Court.

But it has been Objected, That this ought to have a favourable Construction.

I Answer, But not so as to dispence with that form the Execution of the Power is limited to be done by. In the 6 Co. 33. Powers that are to disvest an Estate out of another person are taken strictly, and here (upon the first Fine) the Earl of Leicester had

had no Estate left in him. Mich. 6 Car. 1. in Communi Banco, the Case of Ingram and Parker, which tho' it may not be a clear Authority for me, yet I am sure it does not make against me: The Case was, Catesby levied a Fine to the use of himself in Tail, with Remainders over, reserving a Power to himself and his Son to Revoke by Deed, &c. (as in our Case) and his Son after his decease (by Deed intended to be Enrolled) conveyed to one and his Heirs, and after levied a Fine, and it was held no Revocation.

First, Because he having an Estate Tail in him, the Deed might operate upon his Interest.

Secondly, Because it was but an inchoation of a Conveyance, and not perfected; and they held it no Revocation, and that the Fine levied after, tho' intended to be to the uses of the Deed, yet should extinguish the Power.

Hale Chief Justice. Upon the close and nice putting of the Case this may seem to be no Revocation; for 'tis clear, that neither the Deed nor Fine by it self can revoke; but quæ non valent singula juncta profunt. The Case of Kibbett and Lee in Hob. 312. treats close upon this Case, where the Power was to Revoke by Writing under his Hand and Seal, and delivered in the presence of three Witnesses, and that then and from thenceforth the Uses should cease. It was there Resolved, that a Devise of the Lands by Will (with all the Circumstances limited in the Power) should Revoke; yet the Delivery was one of the Circumstances, and the Uses were to cease then and from thenceforth: Whereas a Will which could have no effect while his Death, did strongly import, that the meaning was to do it by Deed, and yet there the Will alone could be no Revocation; for clearly he might have made another Will after, and so required other Matter, (viz.) his Death to compleat it. And in that Case there is another put, That if a Deed of Revocation had been made, and the party had declared, it should not take place until 100 l. paid, there the operation of it would have been in suspense until the 100 l. paid, and then it would have been sufficient; yet there it had been done by several Acts, and of several Natures, the Intention in things of this nature, mainly governing the Construction. In Terries Case it was Ruled, That if A. makes a Lease for years to B. and then Levies a Fine to him, to the end that he might be Tenant to the Præcipe for the suffering of a Recovery, that after the Recovery suffered his Lease should revive. 'Tis true, in the Case at Bar, if the Fine had been levied first, and then the Deed of Uses made afterwards, the Power had been extinguished by the Fine, and so no Revocation (of that which had no being) could have been by the Deed.

Twilfen

Twisden. What if before the Fine levied the Intent had been declared to that purpose?

Hale. I doubt whether that would have helped it. I cannot submit to the Opinion in Parker and Ingrams Case cited, (*viz.*) That the Deed not being Enrolled, should make no Revocation. For in case of a Power to make Leases for life, it has been always held (by the best Advice) that the better way is to do it by Deed without Livery, (tho' Livery, by the Common Law, is incident to a Lease for life) and so Adjudged in Rogers's Case, for Lands in Blandford forum in Moor's Rep. where Tenant for life hath power to make Leases for life, and makes a Lease by Livery, 'tis there held a Forfeiture; tho' I conceive not, because by the Deed the Lease takes effect, and so the Livery comes too late. Therefore the omission of Enrolling the Deed (in that case) does not seem to be material; but if that Opinion be to be maintained, it is, because the party had such an Interest, upon which the Deed might enure without Execution of his Power; and so rather construed to work upon his Interest. But that Reason does not satisfy, because such an Estate as was intended to be conveyed, could not be derived out of his Interest; therefore it should take effect by his Power, according to Clere's Case in the 6 Co.

So by the whole Court here, the Deed and Fine (taken together) were Resolved to be a good Execution of the Power and Judgment given accordingly.

Richardson versus Disborow.

A Prohibition was prayed to the Ecclesiastical Court, where the Suit was for a Legacy; and the Defendant pleaded, That there was nothing remaining in his hands to pay it, and that he had fully Administred: And producing but one Witness to prove it, Sentence was given against him, and after he Appealed, and because their Court gave no regard to a single Testimony, he prays a Prohibition.

But it was urged on the other Side, That it being a Matter within their Cognizance, they might follow the Course of their own Law: And tho' there are diversities of Opinions in the Books about this Matter, yet since 8 Car. 1. Prohibitions have been denied upon such a Surmise.

Hale. Where the Matter to be proved (which falls in incidently in a Cause before them) is Temporal, they ought not to deny such Proof as our Law allows; and it would be a great Mischiefe to Executors, if they should be forced to take two Witnesses for the payment of every petit Sum: And if they should, after their Death there would be the same Inconvenience. In Yelv. 92. a Prohibition was granted upon the not admitting of

One Witness to prove the Revocation of a Will: Which is a stronger Case, because that entirely is of Ecclesiastical Cognizance. Wherefore let there go a Prohibition, and let the party (if he please) Demur upon the Declaration upon the Attachment, Hob. 188. 1 Cro. 88. Popham 59. Latch. 117.

Pigot versus Bridge

In Debt upon a Bond, Conditioned for performance of Covenants; and the Breach assigned was, in the not quietly enjoying the Land demised unto him.

The Defendant pleads, that the Lease was made to hold from Michaelmas 1661, to Michaelmas 1668; and that paying so much Rent Half yearly, he was to Enjoy quietly; and shews, that he did not pay the last half years Rent, ending at Michaelmas 1668. To which the Plaintiff Demurred, supposing that the words being to Michaelmas 1668. there was not an entire Half year, the Day being to be excluded; and that it was so held in the Case of Umble and Fisher, in the 1 Cro. 702.

Cur' contra. 'Tis true in pleading usque tale Festum, will exclude that Day; but in case of a Reservation, the Construction is to be governed by the Intent.

Anonymus.

Note per Hale. Debt doth not lye against the Executor of an Executor, upon a Surmise of a Devastavit by the first Executor.

First, 'Tis a Personal Tort, for which his Executor cannot be charged.

Secondly, 'Tis such an Action of Debt, as would have admitted Wager of Law, and therefore lies not against the Executor. It was difficultly brought in, that Debt should lye against the Executor upon a Surmise of a Devastavit by himself. But that Point is now settled, but no Reason to extend it further. And he cited a Case, where Debt was brought against A. Executor of B. Executor of C. who pleaded, that he had not of the Goods of C. in his hands.

To which the Plaintiff Replied, That B. had Wasted the Goods of C. to the value of the Debt demanded. Upon which Issue was joyned and found for the Plaintiff, and he had Judgment to recover de bonis B. in the hands of A. But that Judgment was Reversed.

Anonymus.

Anonymus.

If A. Engages, that B. shall pay for certain Goods that B. buys of C. this is good to charge him, upon a Collateral Promise, but not upon an Indebitatus Assumpsit; for it doth not create a Debt.

Anonymus.

In an Information for a Riot, it was doubted by the Court, whether it were Local, being a Criminal Cause: And it was observed, that divers Statutes in Queen Elizabeth and King James's time provided, that Prosecutions upon Penal Laws should be in their proper Counties. Which was an Argument, that at the Common Law they might have been elsewhere.

Taylor's Case.

An Information Exhibited against him in the Crown Office, for uttering of divers Blasphemous Expressions, horrible to hear, (viz.) That Jesus Christ was a Bastard, a Whoremaster, Religion was a Cheat; and that he neither feared God, the Devil, or Man.

Being upon his Trial, he acknowledged the speaking of the Words, except the word Bastard; and for the rest, he pretended to mean them in another Sense than they ordinarily bear, (viz.) Whoremaster, i. e. That Christ was Master of the Whore of Babylon, and such kind of Evasions for the rest. But all the Words being proved by several Witnesses, he was found Guilty.

And Hale said, That such kind of wicked Blasphemous words were not only an Offence to God and Religion; but a Crime against the Laws, State and Government, and therefore punishable in this Court. For to say, Religion is a Cheat, is to dissolve all those Obligations whereby Civil Societies are preserved, and that Christianity is parcel of the Laws of England; and therefore to reproach the Christian Religion, is to speak in Subversion of the Law.

Wherefore they gave Judgment upon him, (viz.) To stand in the Pillory in Three several places, and to pay One thousand Marks Fine; and to find Sureties for his Good Behaviour during Life.

Walker *versus* Wakeman.

The Case was, An Estate (which consisted of Land, a Rectory, &c.) was conveyed to the use of one for Life, &c. with a Power to Lett the Premises, or any part of them, so as 50 l. Rent was reserved for every Acre of Land. The Tenant for Life Demised the Rectory, reserving a Rent, which Rectory consisted of Tythes only, and whether this was within the Power, was the Question?

Serjeant Pemberton Argued, That this Lease is not warranted by the Power; for a Construction is to be made upon the whole Clause, and the latter Words that appoint the Reservation of the Rent, shall explain the former, and restrain the general Words Premises to Land only; for if it shall be extended further the Settlement (which was in Consideration of a Marriage Portion) is of no effect for the Rectory: As in case it should be Demised, reserving no Rent; which it might be, if not restrained to the latter words, and they applied only to the Land.

But it was Resolved by the Court, that the Lease of the Rectory was good; for the last Clause being Affirmative, shall not restrain the Generality of the former. And this Resolution was chiefly grounded upon *Camberford's Case* in the 2 Rolls 263. where a Conveyance was made to Uses of divers Mannors and Lands, with a Power to the Cestuy que use for Life, to make Leases of the Premises, or any part of them, so that such Rent or more were reserved upon every Lease, which was reserved before, within the space of Two years; and a Lease was made of part of the Lands, which had not been Demised within Two years before: And Resolved, it was a good Lease, and that thereupon any Rent might be reserved; because the Power was General, To Lease all; and the restrictive Clause should only be applied to such Lands as had been demised within Two years before.

Termino

Termino Sanctæ Trinitatis, Anno 28 Car. II.

In Banco Regis.

Memorandum, The last Term Sir Richard Rainsford was made Chief Justice, (Hale Chief Justice quitting it for infirmity of Body) and Sir Thomas Jones was made one of the Justices of the Court of Kings Bench.

Anonymus.

In an Action upon the Case brought against the Defendant, for that he did Ride an Horse into a place called Lincolns in Fields, (a place much frequented by the Kings Subjects, and unapt for such purposes) for the breaking and taming of him, and that the Horse was so unruly, that he broke from the Defendant; and ran over the Plaintiff, and grievously hurt him, to his damage, &c.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, It was moved by Symphon in Arrest of Judgment, that here is no cause of Action: for it appears by the Declaration, that the mischief which happened was against the Defendants Will, and so Damnum absque injuria; and then not shewn what right the Kings Subjects had to walk there; and if a man diggs a Pit in a Common, into which one that has no right to come there, falls in, no Action lies in such Case.

Curia contra, It was the Defendants fault, to bring a Wild Horse into such a place where mischief might probably be done, by reason of the Concourse of People. Lately, in this Court an Action was brought against a Butcher, who had made an Ox run from his Stall and goyed the Plaintiff; and this was alleged in the Declaration to be in default of penning of him.

Wild said, if a Man hath an unruly Horse in his Stable, and leaves open the Stable Door, whereby the Horse goes forth and does mischief; an Action lies against the Master.

Twisden. If one hath kept a tame Fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the Fox doth after he hath lost him, and he hath returned his wild nature. Vid. Hobarts Reports 134. The Case of Westor and Ward.

Anonymus.

Anonymus.

In Trespafs in an inferiour Court, if the Defendant plead son' frank Tenement, to oust the Court of Jurisdiction, It was said by Wild, that they may enforce the Defendant to swear his Plea, as in case of Foreign Plea, (negat Twisden) and as in this Court, where a Local justification in Trespafs, &c. is pleaded, the Defendant must swear it: But the Court held, no Indictment will lie for Perjury in such Oath, no more than upon a Wager of Law.

Anonymus.

In Trover the Hab. corpora Juratorum was returnable, die Martis prox' post mensẽ Paschæ, Nisi prius Richardus Rainsford Mil', &c. venerit die Lune in mensẽ Paschæ, instead of post mensẽ, and so objected, That there was no Authority to try the Cause, there being no such day: And the Court seemed to be of that Opinion, and that there was no Record by which this could be amended; but the Parties agreed to go to a new Tryal; and so this Point did not come to be fully resolved.

Woodward versus Aston.

An Indebitar Assumpsit, was brought by the Plaintiff against the Defendant for 10l. received of his Money. Upon Non Assumpsit pleaded, and a Tryal at the Bar (which the Court permitted, because the Parties were Officers of the Court,) the Case appeared to be thus.

The Master of the King Bench Office, or Chief Clerk, had granted the Office of Clerk of the Papers, (and agreed on all hands, that it was his to grant it) to Woodward, the Plaintiff and one Vidian, and the longer lber of them.

Vidian being a Recusant, and knowing himself disabled by the late Act of Parliament to continue in the Office, Prays the Court, that Aston might be admitted in his room, which was done accordingly, and within two or three years after Vidian died; and Woodward commenced this Suit against Aston, supposing that he had no right in the said Office.

The Plaintiff, to Entitle himself, shewed a Copy of the Enrolment in this Court, of the Deed of Grant of the Office to him and Vidian. And it was objected on the Defendants part, that this was not Evidence, but they ought to produce the Grant it self, for tho' the Enrolment of a Bargain and Sale is Evidence, because the Estate passes by the Enrolment, without which the Deed would not be sufficient; yet here the Deed passes the Office, and the Enrolment is but as it were a Copy. But the Court ruled, that the Enrolment

Enrolment might be given in Evidence; and of Grants of Offices in this Court, it has been the course to Enrol Deeds. Then the Deed it self was produced by the Defendant, which was cancelled, and urged by his Counsel, that the Estate in the Office was thereby destroyed.

Curia contra, Not as to the Plaintiff, unless it appeared, that he had a hand in the cancelling of it. But then for the Plaintiff it was said, that this was an entire Office, tho' granted to two; and one could not surrender or grant his Interest. But then the Counsel for the Defendant shewed, that when the Defendant was admitted into the Office, the Court demanded of the Plaintiff whether he consented, and he said salvo jure, and seemed unwilling at first; but afterwards the Chief Justice demanded of him, whether he would execute it alone, and told him he knew such things of him, which would make appear it was not proper for him so to do, and then he said he submitted, and that afterwards Sir Robert Henly Chief Clerk, made a new grant to the Plaintiff and Defendant of that Office which the Plaintiff knew of, and yet joined in the Execution with the Defendant, which as was urged amounted to a Surrender of his former Grant. (In 2 Geo. 197, 258. it is said, if an Officer for life accepts a new Grant, 'tis no Surrender of his former Estate.) The Court did not deny, but that if it did appear, that the Plaintiff had accepted this new Grant, it would be a Surrender, and that matter of fact was left to the Jury, and they found for the Defendant.

The Court said in this case, that a Rent or other Grant, was not lost by the destruction of the Deed, as a Bond or Chose en Action was. (Quære, if the party himself Cancel it,) and if the Grantee of the Rent delivers up the Deed to the Grantor, this is no Surrender; but he may sue for his Rent, if he can recover the Deed again, for a Chose en Grant must be Surrendered by Deed.

Curtis & alⁱ versus Collingwood.

IN an Assumpsit, the Plaintiffs declared, That the Defendant was Excommunicated at their Prosecution, for not paying of a Tax made for the Reparation of a Church of which they were Churchwardens; and that in consideration, that the Bishop would absolve the Defendant, at the Defendants Special Instance and request, the Defendant promised to pay unto the Plaintiffs so much. After Verdict, it was moved in Arrest of Judgment, that there was no consideration on the part of the Plaintiff; yet the Plaintiff had Judgment, for it cannot be intended, but that the Bishop absolved the Defendant at their instance, and would not have done it, but upon the account of the Promise, of paying the Money to them.

Termo

Termino Sancti Michaelis, Anno 28 Car. II.

In Banco Regis.

Anonymus:

A Bill of Middlesex was issued out by an Attorney of this Court, against the Countess of Huntingdon, which was discharged by Superedeas without pleading, because it appeared by the Record that she was a Peere, and the Attorney was committed for suing out of the Process.

The City of London against Goree.

Assumpsit for the Duty of Scavage, and declared upon the Custom of London, that every one which exposes Forreign goods to Sale, which had been entered in the Custom-house, shall pay so much for the duty of them: After Verdict, it was alledged in Arrest of Judgment, that no Assumpsit lay for such a Duty, for there ought to be a Contract express, or implied to maintain an Assumpsit.

Again, soasmuch as the Customs of the City are confirmed by Parliament, this is a Duty by Record; Sed non allocatur, for there are multitudes of Presidents in such like Cases; an Assumpsit lies upon a Bill of Exchange accepted, an Assignee of Commissioners of Bankrupt may bring an Assumpsit, and yet the Debt is assigned by Vertue of an Act of Parliament. And the Court said, in such case as this the Declaration might be upon an Indeb. Assumpsit, as it was in the Case at Bar.

Molyn versus Cooke. &c.

In Trespas for Assault, Battery and Imprisonment, until the Plaintiff was forced to spend 20 l. and deliver up a Bond of 100 l. to be cancelled, wherein one Lamplugh, one of the Defendants stood bound to him.

Cooke pleads his Priviledge, as Clerk to one of the Protonotarys of the Common Pleas. The Plaintiff replies, that this Trespas, &c. was done by them joyntly, and that he had taken out an Original against them all; and that this Declaration against Cook was upon that Original, and that he still prosecuted the rest, (viz.) Lamplugh and Jeffries, to which the Defendant demurred: And Judgment was given, (Twilden and Jones only present) quod respondeat ouster.

oust, for Cooke being joyned with others in the Action he shall have no privilege. As Powles Case, Dier 377. he being Clerk of the Crown, was sued with his Wife, and not allowed his Privilege, because sued with his Wife. Vid. Poph. Rep. 329. and Rolls Abr. 1 p. 493.

Brown versus Wait.

In Ejectment, the Case upon a Special Verdict was to this effect; Sir John Danvers being seized of the Lands, &c. in Tail, with the Fee expectant, Anno 1646 and in 1647, levied a Fine to the same uses as he was before seized; save, that a power was reserved to make Leases for any number of years, and without reserving any Rent. Sir John Danvers did after become Guilty of Treason, in Murd'ring of King Charles the first in 1648, and died in 1655.

In 13 Car. 2. cap. 15. the Statute commonly called the Statute of Pains and Penalties Enacts, That sundry of the Offenders in that execrable Treason, of which Sir J. D. was one, should (amongst other Penalties there inflicted) forfeit all their Lands, Tenements and Hereditaments, Leases for years, Chattels real, and interest of what nature or quality soever, See the Act of 14 of this King. The Lands were by Patent granted to the Duke of York, who let them to the Defendant. And John Danvers Heir of Sir John Danvers entered, and made the Lease to the Plaintiff: It had been several times argued at the Bar, and this Term Judgment was given by the Court for the Defendant. And Rainsford Chief Justice delivered the Opinion of the Court, and the Reasons for himself, Twisden, Wild and Jones, as followeth.

The question being, Whether an Estate Tail were forfeited by the words of the Act of 13 Car. 2. It was observed, that all Estates were Fee simple at the Common Law and forfeitable. W. the 1. de donis was the first Statute, that protected Estates Tail from Alienations, and from all forfeitures of all kinds, and so continued until the 12 E. 4. Taltarums Case, from which time common Recoveries have been held not to be restrained by the Statute de donis, (and by the way it must be considered, that Perpetuities were never favoured.) Then came the Statute of 4 H. 7. of Fines, which with the explanation of the 32 H. 8. have been always resolved to bar the Issues in Tail; so as to Alienations, Estates Tail were set free, but were not forfeitable, no not for Treason, until the 26 H. 8. by which they became subjected to forfeitures in case of Treason, and so by 5 E. 6. But 'tis true, these Statutes extend only to Attainders, and 33 H. 8. Vests the Lands, &c. in the Kings possession without Office: Thus having considered the History and Progress of Estates Tail, the reasons why such an Estate should be construed to be forfeited upon this Act of 13 Car. 2. are these.

First, The Crime mentioned is of the same nature, and with the same aggravations as in 12 Car. 2. by which the Offenders are attainted of Treason, &c. for they are called Perpetrators of that execrable Treason, with many Expressions to the like effect; which was looked upon as an offence of that heinous nature, that the same Parliament Enacted, An Anniversary Humiliation throughout the whole Kingdom, to be perpetually observed upon the account of it; as if, not only they that acted it, but the whole Kingdom and their Posterity, (like to another Original sin) were involved in the Guilt of it, Nati natorum & qui nascuntur ab illis. And therefore, the Punishment shall not be mitigated in any other manner, than is expressly provided by that Act.

Secondly, It is proved by the generality, and comprehensions of the words which are made use of, (*viz.*) Possessions, Rights, Hereditaments of what nature soever; Interests, which does as well signify the Estate in the thing, as that wherein the Estate is, which can have no effect if not extended to Estates Tail. We must observe also, that at the making of this Act, entailed Lands were not protected from forfeitures; and tho' 26 H. 8. extends only to Cases, where the Offender is attainted; yet 'tis of good direction to the Judges in Cases of like nature, and 'tis plain, that by this Act of 13 Car. 2. the Offenders were looked upon in *pari gradu* with these attainted; for when the Proviso comes to save the Estates of Strangers, &c. in trust for whom the Offenders were seized, It is said notwithstanding any of the Convictions or Attainders aforesaid.

Thirdly, It is to be observed, that the Act takes notice, that divers of the Offenders included in this Act were dead; now in regard most Lands are known to be entailed, if the Act had not intended such Estates to be forfeited, it would signify nothing indeed, if the Offenders had been alive it might have been somewhat satisfied with the forfeiture during their Lives; But as the case was, it should be of no effect at all after making a great noise of forfeitures and Confiscations, the Act would have been but a Gun charged only with Powder, or as in the Fable, Parturiunt Montes, &c.

Fourthly, It is manifest, that the Parliament did not intend that the Children or Heirs of the Persons within the Penalties of the Act, should have any benefit of their Estates; for in the saving which is made for Purchasers upon valuable Considerations, the Wives Children and Heirs of the Offenders are excepted; then surely if they would bar them of the benefit of their Purchases, a fortiori from inheriting to an Estate Tail, especially of a voluntary Entail, that seems to be made with a prospect of this Treason which was perpetrated a year after, and such an Entail as scarce the like was ever seen before; that a power should be referred

bed to make Leases for any number of years, and without Reservation of any Rent. By which it is manifest, that Sir John Danvers that committed the Treason, was fully Master of the Estate.

Again, all Conveyances are avoided by the Act, unless such as were upon valuable Consideration; which this Fine was not. The great case which has been insisted upon by way of objection, is Trudgeons Case, Co. Litt. 130. Estates Tail were not forfeited upon the Statute of Praemunire, but during the Offenders Life. For answer to that it must be observed, that, that forfeiture is upon the Statute of 16 R. 2. at which times Estates Tail were under the protection of the Statute de donis; but since that time the Judges have not been so strict in expounding Statutes concerning Estates Tail, as appears by Adams and Lamberts Case, 4 Co. That an Estate Tail given for a superstitious use, was within the Statute of 1 E. 6. cap. 4. where the words are generally, and not so large as in our case, nor so much to demonstrate the intent as is in our Act to extend to Estates Tail, wherefore Judgment was given for the Defendant.

Note, They that argued for the Defendant, endeavoured to maintain, that if it should be admitted, that Entails were not forfeited by the Act; yet the Estate of Sir John Danvers, in those Lands would be forfeited, in regard he levied a Fine in 1647, and the Act of 13 Car. 2. extends to all Lands, &c. whereof the Persons therein mentioned were seized, &c. since 1646, and he being Tenant in Tail and levying of a Fine, there is an Instantaneous Fee in him, out of which the new Estate Tail is supposed to be created, and that cannot hold, being derived out of a Fee subject to the forfeiture by Relation; but this Point was not touched by the Judges, for that they were fully agreed upon the other Point.

Beasly's Case.

HE was taken in Execution upon a Recognizance of Bail, and he made it appear to the Court, that he never acknowledged the Recognizance, but was personated by another; and thereupon it was moved, that the Bail might be vacated and he discharged, as was done in Cottons Case, 2 Cro. 256. But the Court said since, 21 Jac. cap. 26. by which this Offence is made Felony (without Clergy,) it is not convenient to vacate it until the Offender is convicted, and so it was done 22 Car. 2. in Spicers Case, wherefore it was ordered, that Beasly should bring the Money into Court, and be let at large to prosecute the Offender. Twifden said it must be tried in Middlesex, tho' the Bail was taken at a Judges Chamber in London because filed here; and the Entry is *venit coram Domino Rege, &c.* So it differs from a Recognizance Acknowledged

ledged before my Lord Hobart, upon 23 H.8. at his Chamber, and Recorded in Middlesex, there Scire facias may be either in London or Middlesex, Hob. rep.

If a false Bayl be acknowledged, it is not Felony, unless it be filed, and so held in Timberly's Case.

The King *versus* Humphrey's & al.

And Indictment upon the Statute of Maintenance, and one only found Guilty; and it was moved in Arrest of Judgment, that seeing but one was found Guilty, it did not maintain the Indictment, 2 Rolls 81. several were indicted for using of a Trade, and said uterque cor' usus fuit, and held not good. Sed non allocatur, for that in that case, in Rolls, the using of the Trade by one cannot be an using by the other. But this is an Offence, that two may joyn in, or it may be several, as in a Trespass.

But then it was alledged, that the Maintenance was in quodam placito, in Cur' coram Domino Rege pendent', and not said where the Kings Bench Sate, and this was held fatal.

Termino Sancti Hillarij, Anno 28 & 29 Car. II.

In Banco Regis.

Jay's Case.

A Mandamus to restore to his place of a Common Council Man in the Corporation of Eye in Suffolk. The Return was that he was amoved for speaking of opprobrious words of one of the Aldermen, (*viz.*) That he was a Knave, and deserved to be posted for a Knave all over *England*. And it was moved that the Return was insufficient, for words are not good cause to remove a Man from his place in the Corporation. To which it was said, that this not a disfranchising of him, but only removing him from the Common Council as a person not fit to sit there. To which Twilden said, that his place there could no more be forfeited than his Freedom; for he was chosen thereunto by the Custom of the place. And Magna Charta is, that a Man shall not be disseised de liberis consuetudinibus. But he held, that words might be a cause to turn out a Freeman, as if they were, that the Mayor or the like did burn the Charters of the Town, or other words, that related to the Duty of his place. But in the Case at Bar the words do

do not appear, to have any reference to the Corporation, wherefore it was ordered that he should be restored.

The Court said, that my Lord Hale held, That Returns of this nature should be sworn, tho' of late days it has not been used, and that it was so done in Medlecot's Case in Cro.

Abram versus Cunningham.

UPON a Special Verdict the Case appeared to be to this effect:

A. possessed of a Term makes B. Executor, who makes three Executors, and dies; two of them dies, and the Will of B. the Executor not being discovered, Administration is granted cum Testamento annexo to D. who grants over the Term. The surviving Executor never intermeddles; but so soon as he had Notice of the Will, Refused before the Ordinary; and the Point was, Whether the grant of the Term in the mean time was good?

Saunders (to maintain it) Argued, That to the making of an Executor, besides the Will there was requisite, that the Executor should assent; and if the Executor refuses, 'tis as much as if there never had been any. There is no Book which proves the Acts of an Administrator void, where there is a Will, and the Executor renounces. Greysbrook and Foxe's Case in Plowden's Com. is, that after Administration granted, the Executor proved the Will. And so in 7 E. 4. 14. in Dormer and Clerke's Case, it was held, that where there was an Executor, who after refused, and Administration committed, the Administrator should have all the Rent, (belonging to the Term in Reversion) which accrued after the death of the Testator. If an Executor be a Debtor, and refuses, the Administrator may Sue him: (Which was denied by Twisden, because a Personal Action once suspended, is ever so.) Dyer 372. If one makes an Executor, who dies, and never proves the Will, Administration shall be granted, as upon a dying Intestate; suppose an Executor de son tort has Judgment against him, Shall not there be Execution upon a Term, as Assets in his hands?

Twisden. It hath been Doubted, whether there could be an Executor de son tort of a Term? or, whether he were not a Disfeisor? And by the same Reason it may be granted in the present Case; for at least the Administrator here, is an Executor de son tort before the Refusal.

Levins contra. Anciently, Bona Intestati capi solebant in manus Regis; as appears in Hensloe's Case in the 9 Co. And since the Power of the Ordinary hath been introduced, it was only to Grant Administration upon a dying Intestate. 4 H. 7. Pl. 10. If the Ordinary cites the Executor to prove the Will, and he Renounces,

nounces, 'tis said he may grant Administration; which implies, that it cannot be before. So 21 H.8. cap. 5. is to grant Administration, &c. upon a dying Intestate, or refusal of the Executor, the Interest of the Executor commences before the Probat. In 36 H.6. 8. an Executor commanded one to take the Goods, and after the Executor refused before the Ordinary, who committed Administration, and the Administrator Sued the person that took the Goods; who Justified by the Executor's Command, and it was held good: And a Relation shall never make an Act good, which was void for defect of Power. And the Court seemed strongly of that Opinion.

But Serjeant Pemberton desiring to Argue it, the Court permitted him to speak to it the next Term. Et sic Adjournatur.

And afterwards it was Argued again, and Judgment was given for the Defendant *per totam Curiam*.

Dunwell *versus* Bullocke.

In an Action of Trover inter al' de uno Instrumento ferreo; *Anglicè*, an Iron Range.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that Instrumentum ferreum was too uncertain, and that a Range was the same with a Grate, for which *Crates* was a proper Latin word.

Sed non allocatur: For *Crates* is such a Grate as is before a Prison: But a Fire Range was not in use in the Romans time; and therefore Instrumentum ferreum is well enough, with the *Anglicè*.

Twisden said, Trover de septem libris has been held good, without saying what they were.

Blackman's Case.

It was assigned for Error, that the Venire was to Summon probos & legales homines, instead of liberos, and so a material Variance; and alledged, that many Judgments had been Reversed for it.

But the Court here being informed, that the Presidents were generally probos instead of liberos, would not allow the Exception.

The King *versus* Armstrong, Harrison & al', &c.

They and others were Indicted for Conspiring to Charge one with the Keeping of a Bastard Child, and thereby also to bring him to Disgrace.

After

After Verdict for the King, it was moved in Arrest of Judgment, that the bare Conspiring, without Executing of it by some Overt act, was not subject to Indictment, according to the Poulterers Case in the 9 Co. And it doth not appear that he was actually Charged with the Keeping of a Child; nay, 'tis alleged, 'twas but a pretended Child, neither was he by Warrant brought before a Justice of Peace upon such an account; but only that they went and affirmed it to the party himself, intending to obtain Money from him, that it might be no further disclosed.

Sed non allocatur: for there was as much Overt act as the nature and design of this Conspiracy did admit, in regard there was no Child really, but only a Contrivance to Defame the Person, and Cheat him of his Money; which was a Crime of a very heinous nature.

Then it was alleged, That this was tryed at the Old-Baily, commonly called Justice-Hall, in London; and the Jury came de Warda de Faringdon extra London, which appeared to be out of the Jurisdiction. Sed non allocatur.

For the Name of the Ward is Faringdon extra, to distinguish it from Faringdon infra; but both are known to be in London.

Whereupon Judgment was Entered up against them; and Armstrong, which appeared to be the principal Offender, was fined 50 l. and the other 30 l.

Burrough's Case.

HE and others were Indicted; for that they being Church-wardens, Overseers of the Poor, and a Constable, did contemptuously and voluntarily neglect to Execute divers Præcepta & Warrants, directed to them by the Bayliffs of Ipswich (being Justices of the Peace) under their Hands and Seals, &c. It was moved to quash it; for that the nature and tenour of the Warrants were not expressed in the Indictment: for unless the parties know particularly what they are charged with, they cannot tell how to make their Defence.

And for that Reason it was quashed by the Court.

Note, The Court never gives Costs, for not Executing of a Writ of Enquiry of Damages, tho' Notice be given.

Anonymus.

Anonymus.

A *Q* Indictment of Forcible Entry into certain Lands in the possession of J.S. was quashed, for not shewing what Estate J.S. had; and tho' the word Disseisavit were in, the Court held, that tho' that might be taken to imply a Freehold, yet it was not sufficient, Vid. Mo. 481. And another was quashed, because it was said possessed pro termino: But the Court held, that if it had been pro termino annorum, tho' not said for how many years, it had been well.

Note, A Bayliff caught one by the Hand (whom he had a Warrant to Arrest) as he held it out of a Window. And the Court said, that this was such a Taking of him, that the Bayliff might justify the breaking open of the House to Carry him away.

Kent *versus* Harpool.

A *Q* Ejectment: The Case came hither by a Writ of Error out of the Kings-Bench in Ireland, and divers Points were in it which concerned the Act for Settlement of Lands in Ireland. But the Case was (as to the great Point at Common Law) to this effect:

Father Tenant for Life, Remainder to the Son for Life, Remainder to first Son of that Son (who was not born,) Remainder to the Heirs of the Body of the Father; the Father died before the first Son was born, and Whether the Descent of the Entail to the Son did prevent the Contingent Remainder, was the Question? It was Argued, that it did not, because the Inheritance came to the Son by Act in Law. And the Opinion in Cordal's Case in the 1 Cro. 315. was cited; the great Reason in Chudley's Case, and other Cases, wherein Contingent Remainders have been held to be destroyed, was for the preventing of Perpetuities, which would have been let in, if Contingent Remainders had been preserved, whatever Act had been done by those which had the Actual Estate. But there is no such necessity of making the like Construction upon Acts in Law. If Lessee for years makes the Lessor Executor, the Term is not drowned: But if the Executor, that hath a Lease, purchases the Inheritance, the Term is gone, because it is his own act; but in the other Case, the Law shall not work that, which must be construed a Devastavit. In Lewis Bowles's Case in the 11 Co. and Co. Litt. where there is an Estate for Life, Remainder to the first Son, Remainder in Fee to the Tenant for Life; the Estates at first close and open again upon the Birth of the first Son, which should take the Remainder. And so it may be here. But

But the Court seemed to be of Opinion, that the Contingent Remainder was destroyed by the Descent of the Estate Tail. And Rainsford, Chief Justice relied upon Wood and Ingersol's Case in the 2 Cro. 160. where a Devise was to the first Son for Life, Remainder to the Son which should survive; and there three Judges against one held, that the descent of the Fee upon the first Son, prevented the Contingent Remainder to the Survivor. Et Adjournatur.

Note, In Lewis Bowle's Case the Estates were united at the first, upon making of the Conveyance.

Smith versus Tracy.

In a Prohibition the Case was, One died Intestate, and whether his Brother of the Half-blood should come in for Distribution (upon the new Statute of 22 & 23 Car. 2. cap. 10.) was the Question?

It was Argued, that the Half blood should have no Share; for the Words are, The next of Kindred to the Dead person in equal Degree; which the Half-blood is not. The Words likewise are, Those which legally represent their Stocks; and that must be intended in an Act of Parliament, such as the Common Law makes to be Representatives, and not the Civil Law. For then it would be, that the Bastard eigne should come in for Distribution. For their Rule is, that subsequens matrimonium facit legitimum. Granting of Administrations was originally Temporal, and came to the Churchmen by the Indulgence of Princes, and therefore must in some sort be governed by the Temporal Laws. In Administrations the Whole Blood ought to be preferred before the Half Blood; for Next of Kin shall be taken to be meant by the Statute, such as our Laws judge to be so; Rolls tit. Prohibition 303. and so it was held in one Brown's Case before the Delegates in 8 Car.

This being a New Case, the Court gave no Opinion; but Adjourned it to the next Term. Postea.

Q 9

Termino

Termino *Paschæ*, Anno 29 *Car. II.*

In Banco Regis.

NOte, Where Justices of the Peace find a Force, and make a Record of it upon their View; they are to Commit the Offenders, but cannot restore the Possession.

Anonymus.

A Prohibition was prayed to a Suit in the Spiritual Court, for Money tared for the Reparation of the Church, upon a Surmize that the Tax was imposed upon one part of the Parish, omitting the rest. And for this was cited Roll's sic Prohibition 291. in the Point.

But the Court doubted, in regard it was not alledged, That they had offered that Plea in the Ecclesiastical Court; because Reparation of Churches is proper for their Cognizance. But the Prohibition was granted, and the other might Demur if they thought fit: But afterwards in this Term it was Countermanded.

Anonymus.

A Prohibition was prayed to the Admiralty, where there was a Libel for a Ship taken by Pirates, and carried to Tunis, and there Sold; for that it did not appertain to the Court to try the Property of the Ship, being sold upon Land.

Curia. In regard it was taken by Pirates, it is originally within the Admiral Jurisdiction, and so continues notwithstanding the Sale afterwards upon the Land. Otherwise where a Ship is taken by Enemies, for that alters the Property: And this was the Opinion of the Court in Eglesfield's Case, in my Lord Hales's time, contrary to my Lord Hobart in the Spanish Ambassador's Case 78. in the 1 Cro. 685. they have Cognizance of the Case of the Pirate, because incident to the Principal Matter.

But afterwards it was observed upon the Libel, that there was no mention made, That the Ship was taken super altum Mare. And tho' there was contained therein very much to imply it; yet the Court held that to be absolutely necessary, to support their Jurisdiction.

Note,

Note, One taken upon an Excom' Cap' was Discharged; because the Writ de Excom' Cap' was not delivered into this Court and Enrolled, as is required by the Statute.

Robinson *versus* Woolly.

IN an Ejectment, upon a Special Verdict, the Case appeared to be thus:

A Clerk was Admitted and Instituted to a Benefice within the Diocese of Gloucester whilst the Bishoprick was Vacant, and a Mandate from the Archbishop for Induction; but before it was Executed by the Archdeacon, a new Bishop of Gloucester was Consecrated; and whether the Induction coming after was sufficient, was the Question?

That it was,

It was Argued that after the Mandate made, it was Executed so far as the Bishop had to intermeddle in the matter. For if no Induction does follow, the Remedy lies not against the Bishop, F.N.B.47.h. But an Action upon the Case against the Archdeacon, for the Induction, is said to be a Temporal Act, 1 Rolls 125, 195. Neither can such Mandate be Revoked by the Bishop, or be Inhibited by the King, 1 Rolls 294.

Again, the Archbishop hath a concurrent Jurisdiction with the Bishops throughout his Province, and may Admit and Institute until the Inferiour Bishoprick is full. And the Statute of 23 H. 8. cap. 9. takes away the Jurisdiction of the Metropolitan only, as to Proceedings in that Court: In case the Inferiour Ordinary refuses to Admit, the Archbishop may do it, as appears Hob. 15. Hurton's Case, and Mo. 879.

It was said on the other side, That this was but an Authority derived from the Bishop, and therefore ceasing before it was Executed, is determined. The Bishop may direct his Mandate to another, as well as the Archdeacon. It was compared to a Letter of Attorney, to make Livery, which cannot be done after the Death of him that gave it. *Et Adjornatur. Postea.*

Anonymus.

IN an Information of Forgery, the Defendant Challenged one of the Jury, for that the Prosecutor had been lately Entertained at his House: This was admitted to the Favour, tho' against the King, (Vid. for that in the 1 Cro. 663.) And then the Counsel for the King challenged another, and being pressed to alledge the Cause; for 33 Ed. 1. does take away the General Challenge, quia non sunt boni pro Rege.

Q. 112

But

But all the Court (save Wild, who seemed to be of another Opinion) ordered the Panel to be first gone through, and if there were enough, the King is not to shew any Cause.

Vertue versus Bird.

IN an Action upon the Case the Plaintiff declared, that it was agreed between him and the Defendant, That he should carry the Defendants Timber from a certain place to the Defendants House; then and there to deliver at such place as the Defendant should appoint; and that such a Day and Year he did carry with certain of his Carts to the place aforesaid, the said Timber there ready to be delivered, but that the Defendant delayed by the space of six Hours the Appointment of the place; insomuch that his Horses being so hot with Carrying of the Timber aforesaid, and standing in aperto Aere, they died soon after.

After Not Guilty pleaded, and a Verdict for the Plaintiff, Ventris moved in Arrest of Judgment, that here did not appear any Cause of Action; for it was the Plaintiffs folly to let the Horses stand: Neither was the Defendant under the Penalty of an Action bound to receive the Timber, or appoint a place; but in case of Refusal the other might recover what he Contracted for the Carriage, having done all on his part; but not to bring an Action for not appointing a Place. And by the Opinion of all the Court the Judgment was stayed. Vid. 2 Cro. 386. Roll. Rep. 275. Baily and Merritt.

Anonymus.

IT was moved for the setting aside of an Order of Sessions, for the setting a Poor person in a Town, which had been sent thither by a Warrant of two Justices, and it was Confirmed upon an Appeal to the Sessions.

But the Court would hear nothing of the Merits of the Cause; the Order of the Sessions being in such case final, unless there were an Error in the Form.

Note, A man gives a Warrant of Attorney to Confess a Judgment, and dies before the Judgment is Confessed: This is a Countermand.

Anonymus.

Justices of the Peace at the Sessions, Ordered the Father of him which had the Bastard Child, to provide for it under the presence of the reputed Grandfather; for the Statute doth enable them to Tax the Grandfather of a Legitimate Child.

But

But in this Case the Court held, there was no Colour, and therefore quashed the Order. And Wild said, It was well Westminster-Hall Doors were open.

Kent versus Derby.

INdebitatus Assumpsit. The Plaintiff declared, that the Defendant being indebted to him in a certain sum, pro diversis mercionis ante tunc venditis & deliberatis ad requisitionem, of the Defendant to a Stranger, did promise to pay, &c. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that this was but a Collateral Promise, and that no Indebitatus Assumpsit would lie, for the Debt was from the person to whom the Goods were sold. Wild and Jones held the Action well brought, and cited an Action sur indebitatus Assumpsit lately in this Court, against one for Money promised in Marriage with his Sister. Vid. R. 120 & 122. Sed Rainsford Chief Justice contra. But the Plaintiff had Judgment.

Termino Sanctæ Trinitatis, Anno 29 Car. II.

In Banco Regis.

Howlet versus Carpenter.

The case upon a Special Verdict in Ejectment was this, a Copholder of a Dean and Chapter, levied a Fine with Proclamation, and five years passed without any Seizure or Claim by him that was Dean at the time of the Fine levied, and whether the succeeding Dean was barred was the question. And the Court at the first opening held clearly that he was not, for if so, the Statutes 1 & 13 Eliz. which restrain the Alienation of the Church Revenue, would be of small effect, 11 Co. Magd. Colledge's Case.

The Company of Ironmongers versus Nailer.

In Trespass upon Not guilty, a Special Verdict was to this effect; that Nailer being one of the Officers for Collecting of the Duty of Hearth Money, distrained for a certain Sum, accruing for the Chimneys of a new built House which had never been inhabited; neither did it appear, that there had been any account of the Chimney's thereof returned into the Exchequer. There were made three questions.

First;

First, Whether any thing shall be paid for Chimneys in such new built Houses?

Secondly, Whether the Distress can be for that Duty in other places than at such Houses?

Thirdly, Whether there can be any Distress taken before such time as the account of the Chimneys be returned into the *Exchequer*.

As to the first, the whole Court were clear of Opinion, that such new Houses which were never inhabited were chargeable, for the words of the first Act are express, (*viz.*) That every Dwelling and other House, and Edifice (other than such as are after excepted) shall pay. And there is no exception that extends to such House, altho' it were objected, that the Proviso in the Act of 14 is, that the Duty shall be chargeable only on the Occupier, and every Clause in the Act runs upon Occupiers; and the Act of 15 recites the Kings Revenue to have been much obstructed, for want of just Accounts of Chimneys, under the hands of the Occupiers; and the Act of 16, charges the next Occupiers with the half years payment, where the former Occupier removed before it grew due; which implies, if an House stood empty for longer time it should not be paid.

Again, it is appointed to be demanded at the House, and in case of refusal to distrain; which shews an intention, that it should be inhabited.

But it was answered, That the words before mentioned were so full as not to be avoided, and that there were sundry Clauses also in the Act which did import an intention, that empty Houses should pay; and so hath been the practice ever since the Act, and that there were no manner of difference between these Houses, which were new built, and other Houses; that in case there was no Tenant, the Owner was understood to be Occupier, as if the Owner grants an House in his Occupation, it would be well, tho' he did not inhabit it himself, if it were inhabited by no other. The Act of the 13 and 14, appoints notice to be fixed upon the Door, for an account to be given in case there be no Inhabitant, and six days after such notice to enter and take account, which shews they meant empty Houses should be chargeable; and why not as well as for Chimneys, whereof no use is made?

As to the second Point the Distress it well taken, tho' it doth not appear to be after an account made into the *Exchequer*, for the duty accrues before; and that is provided only, that the King might be apprized of the number of Chimneys, and so there might be a check upon the Collectors when they make their Accounts; neither is any Process appointed to go out upon such Return of the number of Chimneys. The Statute of 21 Jac. appoints Informers to be Sworn, but if an Informer be not Sworn, 'tis but a neglect in the Officer: The Proceedings are notwithstanding sufficient,

sufficient, Mo. 447. where 21 H. 8. appoints the Enrolments of Dispensations in Chancery; yet if not done, it does not invalidate the Dispensation.

Thirdly, The Distress was resolved to be well taken being in the Kings Case; for an Act of Parliament shall be expounded according to the reason of the Law in such Cases.

Note, Livesay, the Secondary craved the Opinion of the Court, whether he should pay treble Costs in this Case; for the Act of 14 gives treble Costs where any person is prosecuted, for what he should do in execution of that Act, &c. Now that Act appointed the Constables, &c. to Collect and Execute the Act. But now by virtue of the subsequent Acts for the Chimney Money; the Collection, &c. is by other persons, and the doubt is, whether they can have treble Costs by the Act of 13 and 14.

But the Attorney General, who was of Counsel with the Defendant said, he would not insist upon treble Costs at this time, because this Cause was brought on by consent, for the determination of the doubt about new empty Houses paying, but desired that it might be without prejudice.

Baker versus Bakers.

A Prohibition to the Delegates. The case was, that Administration had been granted to the Wife, upon which an Appeal was brought by the Mother of the late estate, upon this Allegation (in' al) That the Wife had Covenanted, that she would not intermeddle in the Administration, in regard she had been otherwise sufficiently provided for; for it was said, that the Ecclesiastical Judges had not to do with such matter. But it was objected on the other side; that it fell incidently into the principal matter whereof they had Cognizance, but they might be prohibited, if they judged the effect of it contrary to our Law; neither did it appear, that the Delegates would admit of this Allegation, and there were no precedents for a Prohibition quia timeret.

But on the other side it was said, that there would be a Commission out to examine this matter of course before the Judges Delegates should sit to hear the merits of the case, and that would take up so much time, that many of the Goods being bona peritura, would be lost, (but note, the Ecclesiastical Judges may provide for the disposition of them, in case of such necessity, pendente lite.) And the Court granted the Prohibition quoad that Allegation only.

Anonymus.

Tothil *versus* Ingram.

In Replevin, the Defendant avowed for an Herriot, and Arrears of Rent upon a Lease.

In Bar of this Avowry, as to the Herriot the Plaintiff pleaded, That in a former Replevin brought by him against J.S. the said J.S. made Conuzance as Bailiff to the Defendant, for the same Herriot, and was barred: And to the rest he pleaded a Release of all demands, made unto him by the Avowant before this Rent accrued, and to this the Avowant demurred.

First, for that he doth not shew, that he which made Conifans was Bailiff to the now Avowant, for he might make Conifans without his Privy; and if so, it could be no bar to him now.

As to the Release it was said, that a Rent incident to a Reversion would not be barred by such Release: And so it was adjudged in this Court, in Hen and Hampsons Case, in the year 1662 by Foster Chief Justice, Windham and Mallet, against the Opinion of Twilden, who now said that, that Resolution was contrary to Littl' Sect' 510. who saith, that a Release of all demands will extinguish a Rent-service. And it was said, that in Hancocks and Fields Case, 2 Cro. 170. it is adjudged that such Release will extinguish a Rent reserved upon a Lease, tho' not a Covenant before it be broken.

To which it was answered, That in Witton and Byes Case, 2 Cro. 486. It is resolved, that if a Lessee Assigns over his Term reserving a Rent, it will be extinguished by releasing of all demands. But Houghton makes a difference between such a Rent, and a Rent incident to a Reversion.

For the first Point the Court held, that if the Bailiff had no Authority to make Conifans, it ought to be shewn on the Avowants part, for otherwise it shall be intended; and this may be Traversed by the Avowant here, tho' the Plaintiff in Replevin when Conifans is made cannot Traverse the being Bailiff.

But for the second Point, Adjournatur.

Sir Walter Plomer versus Sir Jeremy Whitchcot.

The Court were this Term to give their Opinions in the grand Point, (viz.) Whether Sir Jeremy Whitchcot Warden of the Fleet were liable for Escapes suffered by Duckensfield, his Lessee; Duckensfield being insufficient. But the whole Court observing an imperfection in the Verdict, which found that Duckensfield was insufficient when put in, and at the time of his Escape, but it was not found that he was so at the time of the Action brought. Whereupon they declared, that they were all agreed, that Sir Jeremy Whitchcot

Whitchcot was liable, if the said matter had been found, but that they could not give Judgment upon the Verdict as it was found; whereupon the Parties were permitted to take a Venire de novo, but they rather chose to have a Nil capiat, &c. entered; and so bring a Writ of Error; for their Counsel were very strong, that that matter should be intended in a Special Verdict, and their Declaration did alledge him to be insufficient at the time of the Action brought. But Sir Jeremy Whitchcot soon after died, and so the Writ of Error did not proceed.

Ent versus Withers.

In Debt against an Executor suggesting a Devastavit, and to charge him in his own right.

The Defendant pleaded a frivolous Plea, to which it was demurred; but then exception was taken to the Declaration, that it did not set forth any Judgment obtained before; against the Executor de bonis testatoris, without which this Action would not lie in this manner. Vid. Whearly and Lane, Hill. 20 & 21. Car. 2. In Sanders. And of that Opinion were the Court, but Serjeant Pemberton desiring to argue it, saying there was no difference in reason between the Cases, Adjournatur.

Anonymus.

The Court said, that in case of an Indictment and Issue joyned, the Party could not carry it down to Try it by Proviso, for it lay not against the King.

Alfree versus Ballard.

The case was, The Plaintiff had recovered against two in Trover, and now brought a Scire facias against the Bail; who pleaded, that he had taken one of the Principals in Execution, before the Scire facias taken out, 1 Ro. 897. If one hath Execution against the Principal, he cannot afterwards proceed against the Bail nec e contra, but Paschæ 28. of this King it was resolved in the Case of Orlibary and Norris, where the Bail was taken first in Execution, and afterwards the Principal, that they should be both detained until satisfaction, contrary to 1 Ro. 897. So that it appears, that the Plaintiff shall not be concluded by his Election to proceed against the one first. But here the difficulty is, that the Bail by the Plaintiffs act is disabled to bring in both their Bodies according to the Condition of their Recognizance, he having taken one of them himself. Ex Adjournatur.

B r

Smith

Smith *versus* Tracy.

In a Prohibition the case was, Eliz. Smith died Intestate, leaving two Brothers, one of the whole Blood, and the other of the half Blood; And in the Ecclesiastical Court, they would admit the half Blood to come in for distribution with the whole Blood, upon the Act of 22 and 23 Car. 2. cap. 10. Upon which a Prohibition was granted, to which there was a Demurrer. And the question came upon these words in the Act, (*viz.*) That distribution is to be made to the next of Kin of the Intestate, who are in equal degree, and such as legally represent them.

For the Plaintiff it was said, that Statutes were to be expounded by the reason of the Common Law, which took no consideration of the half Blood; insomuch that an Estate should rather escheat then descend to the half Blood: Then the words of the Act are such as legally represent them, which they both do the common Ancestors, but not one another; in this case Consideration is to be had of the intent of the Intestate, which must be supposed to prefer the Brother of the whole Blood, Dier 371. Isted's Case, where the Executor dies Intestate, the Residuary Legatee of the first Testator shall have Administration, and not the next of Kin, because that is suitable to the intent.

On the contrary it was argued, that altho' the half Blood be rejected in descents; yet it is regarded in other Cases, 3 Co. in Ratcliff's Case, the half Blood may be Guardian in Socage. Vid. 2 Ro. 303. and Stiles's Rep. 74, 75. for granting of Administrations to the half Blood; there cannot be two degrees made of the whole Blood, and the half Blood; neither does our Law make any distinction, but when it wholly excludes them.

Curia. The intent of this Act was, to give the Ecclesiastical Court the Jurisdiction in this matter, and to provide for the distribution of Intestates Estates; which they had a long time attempted and contested, but were still prohibited, but now this Act permits them to proceed; and it were fit we should be informed, what their course is and has been, and therefore let us hear the Civilians as to this point. Post.

The King and Marlow.

The Defendant being a Printer, was indicted for his second Offence, for Printing of a Seditious Book contrary to the Act of 14 Car. 2. cap. 33. and being found Guilty at the Sessions of the Old Baily, the Judgment was given, That he should be for ever disabled to exercise the Art or Mystery of Printing, and pay 20 l. Fine, and to stand in the Pillory; And a Writ of Error was brought

brought, and Errors were assigned in the Judgment, as varying from the words of the Act. For,

First, The Act is, That he should be disabled to exercise the Art and Mystery of Printing or Founding of Letters: And the Judgment is only to disable him from Printing.

Secondly, The Act is, That he shall receive such further punishment by Fine, Imprisonment, or other Corporal Punishment: And the Judgment is, both for a Fine and Corporal Punishment, when it ought not to be for both.

Curia. The first is, as it should be; for Printing and Founding of Letters are two distinct Trades; and the words are to be taken respectively to such Trade as the Defendant is of.

Again, 'tis a Rule, that a Man shall not Assign an Error in that which is for his advantage.

But the second was held an Error, for that the Act did not intend a Fine and Corporal Punishment both, and therefore the Judgment was reversed.

Termino Sancti Michaelis, Anno 29 Car. II.

In Banco Regis.

Davis *versus* Price.

IN Error upon a Judgment in the Common Bench in an Action of Trover, where Judgment was given by default.

The Error was assigned in the Declaration, which was de decem Juvencis (Anglice:) Bullocks and Heifers, and not said how many of one and of the other.

But it was answered, that the Latin word being proper and of known signification, the Anglice was void, according to Osborns Case, 10 Co. But the Court reversed the Judgment, and cited the Case before in this Court, Trover de viginti ovibus matricibus & agnis: And it was resolved to be naught, for not ascertaining the number of each. But Twisden said, there was a Trover brought de Viginti averiis, (viz.) Bobus agnis, &c. and Viginti was applied to each Species, and held well. It was offered in this case, to distinguish it from the case de Ovibus matricibus & agnis, that there the Latin was of two sorts; Sed non allocatur, for the words here being Equivocal it was all one.

Dutton *versus* Pool.

A *Non Assumpsit*, the Plaintiff declared, That his Wives Father being seized of certain Lands now descended to the Defendant, and about to cut a Thousand pounds worth of Timber off from the said Lands, to raise a Portion for his said Daughter; the Defendant promised to the Father in Consideration, that he would forbear to sell the Timber, that he would pay the said Daughter 1000 l.

After Verdict, upon *Non Assumpsit* for the Plaintiff, it was moved in Arrest of Judgment; that the Father ought to have brought this Action, and not the Husband and Wife; and there was a case shewn to be adjudged in the Common Bench, Hillary 23 and 24 Car. 2. Rot. 1538. between Pine and Norris, where the Son promised the Father, that in Consideration that he would Surrender a Copyhold to him, that he would pay a certain Sum to his Sister, for which she brought the Action and then held, that it would lie for none but the Father; for where the Party to whom the Promise is to be performed, is not concerned in the meritorious cause of it, he cannot bring the Action. But if a Promise were to a Man, that if his Daughter should Marry his Son, he would give her 1000 l. there, because the Daughter does the Act, which is the Consideration, she may bring the Action.

On the contrary the Case was cited, 1 Rolls 32. Starkey and Miln, where in Consideration of certain Goods sold, the Promise was to pay part of the Money to another there, that other might bring the Action. And it differs from the case where Money is delivered to A. to pay over to B. B. may bring Debt, Yelv. 24. If the Father had in the Case at Bar cut the Trees, And the Son had said, Let me have the Trees, and I will pay the Daughter so much, that had been the same with the Case before cited, 1 Roll. and it doth not seem to differ, as it is 1 Cro. 163. Rookwood Case, where the Father being about to charge the Land with a Rent of 4 l. per Annum to his Younger Sons; the Eldest promised, that if he would forbear to charge the Land, he would pay the 4 l. per Annum, and the Sons upon this brought the *Assumpsit*, and recovered (Sed vide librum, that Promise is said expressly to be made to the Sons who were present.) Vid. 1 Cro. 629. 652. Levere and Haws Case, where the Promise was made to a Man in Consideration, that he had agreed, that his Son should Marry his Daughter, and to settle such a Joynture upon her, that he would give the Son 200 l. with her; and for this the Father brought the Action, and held well brought, tho' the Court seemed to incline, that the Son might also have brought it. And the Court here inclined for the Plaintiffs. Sed Adjournatur. Post.

Saunders

Saunders *versus* Williams.

IN an Action upon the Case the Plaintiff Declared, that he was seised in Fee of one Acre, and possessed for a certain number of years in another Acre, and had a Common in Black-acre for Beasts levant and couchant thereupon; and that the Defendant put his Beasts in the place, and disturbed him.

The Defendant pleaded a Title of Common to himself also there. Upon which Issue was joyned, and found for the Plaintiff; and it was now moved in Arrest of Judgment, that the Plaintiff had made no Title to the Common by Prescription or otherwise.

Sed non allocatur: The Defendant being a Wrong-doer: And the same Matter was Adjudged in the Court between St. John and Moody, St. Mich. 27 Car. 2. quod vide ante, and in the 2 Cro. 43. 122. & 3 Cro. 500.

Robinson *versus* Woolly.

The Case was this Term Argued again: And Holt Argued, That the Induction, tho' executed by the Archdeacon after the New Bishop was Consecrated, was sufficient.

The Bishop is only to Admit and Instruct, and to send a Mandate to the Archdeacon to Induct, who is to do it de communi jure; and therefore if the Bishop hath Admitted and Instituted, and made a Mandate for Induction, 'tis a sufficient Excuse for him in a Quare impedit; (11 H. 4. 9.) for the Bishop is merely a Spiritual Officer. A Prebendary is to be Inducted by the Dean and Chapter, Pl. Com. 529.

But 'tis Objected, That the Archdeacon does not Induct ex Officio, but a Mandate from the Bishop is requisite; (scilicet,) First, The Mandate is to intimate to him, that the party is Instituted.

Secondly, To oblige the Archdeacon to Induct, under the penalty of an Ecclesiastical Censure.

But if it be granted, that the Archdeacon's Authority in this matter is only derivative; yet that being Executed (by the Mandate) quoad the Guardian of the Spiritualities, what remains to be done remains only to the Archdeacon, who shall finish what hath proceeded so far already. If a Venire be awarded to the Coroners, because of Kindred in the Sheriffs Family; tho' a New Sheriff comes in before it be Returned, yet the Coroner shall proceed in the Execution thereof. The Sheriff seized Goods by a Seize facias, and before they were sold a New Sheriff was made, and then he sold them, and it was Resolved that the Sale was good, in the 2 Cro. 73. Ayre and Aden's Case.

Sed

(Sed Nota, The Court said, that if the Old Sheriff had Returned, That the Goods had remained in his hands pro defectu emptorum, a Distringas should have gone to have them delivered to the New Sheriff, and then a Venditioni exponas should have gone to the New Sheriff, Vid. Yelv. 44.)

In the 2 Cro. 48. the Executors of the Bishop of Carlisle were admitted to proceed in a Suit commenced by the Testator in the Ecclesiastical Court, because the Suit was well commenced, and the Court were possessed of the Cause: Where Commissioners of Oyer and Terminer have given Judgment, and a New Commission granted which determines the Old; yet the former Judgment may be Executed, Bro. tit. Commission 13. So by the Sitting of the Kings Bench, the Commission at the Old Baily, being in the same County is superseded, and yet Execution is done in Term time.

But the Court said, That was by the Statute of 2 E. 6.

Again, Induction is but a Formality, and therefore shall not be so strictly Examined. Where the Queen granted to two the Stewardship of a Mannor, it was held, that admission by one of them was sufficient. Mo. 107. Noy's Reports, (Quære that Case) the Archdeacon having received a Mandate for Induction, makes a Precept omnibus literatis infra Archidiaconatum to Induct, and a Clerk who did not belong to the Archdeaconsry made the Induction; and this was held to be well enough.

Saunders contra. The only Question is, Whether the Archdeacon Inducts by his own Authority, or derivative from the Bishop? For if by the latter, then the Induction cannot be good.

'Tis clear, that the Archdeacon is but Minister Episcopi, and in his Precept to those of the Clergy, to Execute he does as a Sheriff doth, who makes a Precept to his Bayliffs, recites his Mandate. If the Sheriff makes Execution after the Kings death, if he hath no notice thereof, he is excused in Trespass; but the Execution shall be avoided. It appears by the making of the Statute of 2 E. 6. of Executing Judgments given by Commissioners after such time as the Commission is expired, is a great Doubt; and yet there the thing was Executed in a great part: But here 'tis but one single Act, whereof no part was done before the New Bishop was made. In Sir Randolph Crew's Case in the 3 Cro. 97. it appears, that Commissioners to Examine Witnesses, could not proceed after Notice of the Demise of the King.

But here 'tis Objected, That the Verdict finds that the Archdeacon had no Notice.

I Answer, That the Consecration of a Bishop, is a publick and notorious Act.

And

And all the Court were of Opinion, that the Induction was wholly void, and gave Judgment for Woolly the Defendant, and said, It was a Ministerial Act in jure Episcopi, and like a Letter of Attorney to deliver Seisin, which cannot be Executed but in the Life of him that made it. Ante.

Quære, Whether this Judgment was not afterward Reversed in the Exchequer Chamber.

Ent *versus* Withers.

The Case was, Debt against an Executor upon a Bond of the Testator, and it was brought in the Debet and Detinet, suggesting a Devastavit in the Executor.

The Defendant Demurred: For altho' such Action will lye, if there has been a Judgment against the Executor, yet no such Action has been upon a Bond; and 'tis hard upon such a Surmize to Charge the Executor in his own Right.

But on the other side it was said, That this differs not in Reason from the Case of a Judgment, and up Nil debet the whole Matter shall be brought in question; as Whether the Bond was Sealed, &c. And in a Case between Merchant and Driver, tryed at Guild-Hall before my Lord Hale, where it was brought as this; because the Plaintiff could prove no actual Wasting (as is necessary in this Case) he was Non-suited. But Hale took no Exception to the Action.

But the Court said, That they would extend these Actions no further than they had been already Resolved; and they would not agree, that an Executor should be held to Bail upon a surmize of a Devastavit, and so Judgment was given for the Defendant. Ante.

Pierce *versus* Win.

Error out of the Grand Sessions of Wales: The Case upon a Special Verdict was thus;

A Devise to one and to the Heirs Males of his Body, with a Proviso, That if he does attempt to Alien, then immediately his Estate shall cease, and another shall Enter.

The Devisee in Tail made a Feoffment, and he in Remainder Entred, and Judgment was given in the Grand Sessions for the Feoffee against him in the Remainder.

And the Errors were assigned in the Matter in Law: And to maintain the Errors it was said, That it must be agreed of all hands, that a Tenant in Tail could not be restrained from Aliening by Fine or Recovery; and also, that in this Case a bare Attempt would be no breach, according to Corbett's and Sir A. Mildmay's Case, &c. and also, that a Tenant in Tail might be restrained to Alien by Feoffment or other Act which was torious,
and

and would make a Discontinuance ; and here this Proviso imports as much, and therefore the Feoffment will be a breach ; for that is an Attempt and more. For,

First, In Conveyances, the Intention of the words of a Condition and the Substance is regarded, and the form of the words not so precisely followed. As a Feoffment upon Condition, That the Feoffee shall give the Land in Frankmarriage with the Daughter of the Feoffor : This cannot be strictly pursued ; yet the Feoffee must make a Gift as near as may be, Co. 1 Inst. 217. So upon Condition to give the Land to a Layman in Frankalmoign : But this Rule holds (especially in Wills) where the Intent is chiefly looked at. A Devise of all his Rents will pass Reversions upon Leases, and tho' the words be here, Proviso if he does attempt to alien ; 'tis as much as to say, Proviso, if he doth alien, &c.

Secondly, Whether the Feoffment shall determine the Estate quasi by Limitation, so that the Remainder man shall take immediately by Executory Devise, and that is very clear. For tho' in M. Portington's Case in 10 Co. 'tis said, that the word Condition shall not in a Will be taken as a Limitation ; yet the Current of the Authorities since are otherwise.

But here the Court held the Condition void ; for a man cannot be restrained from an Attempt to Alien : For non constet, what shall be judged an Attempt, and how can it be tryed ? And when the express words are so, there shall not be made another sort of Condition than the Will imports. And so the Judgment was affirmed.

Osborn *versus* Beversham.

DEbt for Rent, incurred at two Half years.

As to one of them the Defendant pleaded non debet.

And as to the other, Actio non ; because he says, He was ready to pay it at the Day and Place, and has been ever since ; & professeth in Cur' the Rent ideo petit Judicium de damnis. To which the Plaintiff Demurred.

For that he did not say, quod obtulit ; for where the Time and Place of Payment is certain, Semper paratus is no Plea without an Obtulit.

For the Defendant it was said, That the Plaintiff ought to reply to a Demand, 1 Inst. 34. 'Tis a good Plea for the Heir in Dower to save his Damages to say, That he was always ready. Rastal's Entries 159. Semper paratus is pleaded without an Obtulit. So 1 Rolls 573. no mention made of a Tender.

But then another fault was found, that it was pleaded in Bar, whereas it ought to have been only in Bar of Damages, and not to the Action ; and this was agreed to be fatal.

But

But the Court held the Plea to be naught for the other Cause also.

Anonymus.

In an Ejectment upon a Special Verdict, the Case was:

A man Devised his Land to J.S. after the death of his Wife. And after Argument, the whole Court were of Opinion, that J.S. not being Heir to the Devisor, there should go no Implied Estate to the Wife; for an Heir shall not be defeated, but by a necessary Implication.

Anonymus

An Action for Words; for that the Defendant said of the Plaintiff, He would have given Dean Money to have Robbed Golding's House, and he did Rob the House.

After Verdict, it was moved in Arrest of Judgment, that the first part of the words import only an Inclination, and not that he did give any Money: And the words, He did Rob the House, shall be referred to Dean as the last antecedent, and not the Plaintiff.

But the Court were of Opinion for the Plaintiff, as was adjudged where the words were, He lay in wait to Rob. Vid. Cockain's Case in the 1 Cro. and in the 4 Co. And the Court said, the Words might be construed, That the Plaintiff offered Dean Money, and he refusing it, that the Plaintiff robbed the House himself.

Smith versus Tracy.

The Case being moved again, the Opinion of the whole Court was, That the Half-Blood should come in for Distribution upon the new Act: for as to the granting of Administration, the being of Guardian, &c. the Half Blood may be taken nearer of Kin. than a more remote Kinsman of the Whole Blood, Mo.635 Ro.Rep. 114. Ante.

J——'s Case.

J brings his Habeas Corpus: The Return was, that he was Committed by J. S. J. N. T. K. (to whom, and others, a Commission of Bankrupt was awarded) for refusing to answer a Question put to him concerning the Bankrupt's Estate, &c. and so Commissus fuit in custodia by a Warrant to the Officer Virrute Commissionis predictæ, & hæc est causa captionis seu detentionis, &c.

The Counsel for the Prisoner, took three Exceptions to the Return:

1

First,

First, For that there did not appear a sufficient Authority: For the Commission is said to be granted to them and others, and then they could not act without the rest; for the Return does not express any Quorum, &c. in the Commission.

Secondly, Instead of *Commissus in custodia*, it ought to be *Captus*, for that is the usual Form: For this is, as if the Commitment were by the Officer that makes the Return.

Thirdly, *Hæc est causa captionis seu detentionis*, is uncertain; for it ought to be *& detentionis*.

And upon the first and last Exception the Prisoner was Discharged by the Court; but at the same time was told by the Court, That he must answer directly to such Questions as were put to him, in order to the discovery of the Bankrupts Estate, or else he was liable to be Committed.

Termino Sancti Hillarij, Anno 29 & 30 Car. II.

In Banco Regis.

Harrington's Case.

AN Information was preferred against him, for that he maliciously and traitterously intending to stir up Sedition, and to create a Disturbance between the King and his People, upon Discourse of the late Rebellion, and those Persons which were Executed at Charing-Cross for the Murder of the late King, in præsentia & audita quamplurium utteravit & propalavit hæc verba pernitiola sequentia, (*viz*) Gubernatio nostra consistebat de tribus statibus, & si eveniret Rebellio in Regno, nisi foret Rebellio contra omnes Status, non est Rebellio.

Upon Not Guilty pleaded, he was found Guilty of speaking the precedent Words, and Not guilty as to other Words contained in the Information.

It was moved in Arrest of Judgment, that Gubernatio signified the Exercise and Administration of the Government, and not the State of it, which Regimen doth.

Again, That it was Consistebat, and so might relate to the Britons or Saxons Time, or to the late mutations of the Form of Government amongst us, and that to put the words in Latin (without an Anglice) was not to be allowed; for the Translation might either aggravate or mitigate the Sense: And that such a President might be prejudicial as well to the King, as the Defendant.

But

But those Exceptions finding little weight with the Court, his Counsel proceeded to justify, or at least to extenuate the Words, alledging, That the Relation was so great between the King and People, that to raise a Rebellion against the King must also affect the other States; and this, whether the King be taken (as some would have it) as one of the Three Estates; or (as others) that the Lords Spiritual and Temporal make two of the Estates, and the Commons the third, and the King as Chief and Head of all, as is the Statute of 1 Eliz. cap. 3. where the Lords and Commons call themselves the Queens Obedient Subjects, Representing the Three Estates of the Realm of England; and so is the 4 Inst. 1.

But the Court supposing that the Words did tend to set on foot that Position upon which the War (levied in 1641. by the Two Houses against the King) was grounded, were much displeased, that the Counsel would pretend to defend them, or put any tolerable Sense upon them.

It was also insisted upon by the King's Counsel, and agreed by the Court, that the Ancient Presidents, and many latter also, were to express the words in Latin, and this pursuant to the Statute of E. 3. which requires, that their legal Proceedings should be in Latin; and if the words were not so Elegant, yet they would serve in an Information, &c. where 'tis rather chosen to put in words agreeable to the phrase of the Law, than to Tully's Orations.

And so the Court (Wild being absent) delivered their Opinions for the King; but took time to set the Fine, and immediately Committed the Defendant (who before was upon Bail;) as the course is when Judgment is given, altho' no Fine was set.

Anonymus.

IT was said by the Court, upon an Indictment against one for Refusing to take an Apprentice Bound by the Churchwardens and a Justice of Peace, according to 43 Eliz. that in such case a man cannot be Compelled to accept an Apprentice.

Pagett versus Dr. Vossius.

TRin. 16 Car. 2. Rot. 583. In an Ejectment upon a Special Verdict the Case appeared to be thus:

Dr. Brown by Will Devised certain Lands to Dr. Vossius the Defendant, (a Dutchman) during his Exile from his Country; and if it should please God to restore him to his Country, or that he should dye, that then the Lands should go to the Lady Mary Heveningham in fee, who was the Lessor of the Plaintiff.

It was found, that at the time of making the Will, and the Death of Dr. Brown, there was War between England and the States General, and that the Doctor was fallen into Displeasure with the States, and that they had taken a Pension from him of 140 l. per annum, and that by reason thereof he came over: But did not find that he was Exiled by any Act of State, and that the War was now ceased, and that the Doctor might Return, if he pleased; but it did not find, that they had restored him to his Pension, &c.

After divers Arguments on both Sides this Term, Judgment was given for the Defendant by the whole Court.

For they said there was a Voluntary and Compulsary Exile, and in regard he was not Exiled by any Publick Edict, the Will must be understood of a voluntary absence from his Country: And the Jury found, that those Matters which drove him away did still continue, (*viz.*) The depriving him of his Pension.

Nota, Exilium is a word known in our Law, (*viz.*) When Villains, by hard Usage, are constrained to depart from the Mannor.

And if it be Objected, That this durante Exilio is a void Limitation, as being of unknown sense in our Law, 'tis still against the Lessor of the Plaintiff, and then she cannot claim until the Doctor's death, and in the mean time the Descent must be to the Heir at Law. Exilium, quasi ex solo; that is, as if it had been said, During his absence from his Country.

The King *versus* Plume.

HE was Indicted upon the Statute of the 5th of the Queen for that he had set up, used and exercised *Artem Mysterium* five Manual occupationem Pomarii, Anglicè, of a Fruiterer, being a Trade, Mystery, or Manual occupation used in this Kingdom, the 12th day of January, Anno Eliz. 5. in which Trade the said Plume was not brought up by the space of Seven years, &c. And to this the Defendant Demurred.

For that it hath been held, that the Statute extends not to every Trade; but to such an one as requires Art and Skill, and therefore not to a Hemp-dresser, as in the 1 Cro. so in 2 Bulstrode 188. nor to a Pippinmonger, as in 1 Roll's Rep. 10. And so a Gardiner hath been Resolved, not to be within the Act, in the 14th of this King: The Indictment was for the Trade of a Barber, but no Judgment given; (but others said, That in that Case Judgment was for the King.)

On the other side it was said, That the Question here is not of those which sell Apples in Stalls; but the Trade of a Fruiterer is well known, and they are Incorporated in London, and there requires much

much Skill in Sorting of Fruit, and in judging the durableness thereof.

But the Court inclined for the Defendant. But being informed by the Counsel for the King, that there were many Precedents, it was adjourned. Postea.

Harrington's Case.

Harrington was again brought up, and the Court fined him a Thousand pounds, and awarded that he should recant the words in such words as the Court should direct, and to find Sureties for his Good behaviour for seven years; after which he produced a Writ of Error returnable before the Lords then Sitting in Parliament, and prayed that it might be allowed, and that he might be admitted to Bayl.

The Court said, that they allowed the Writ, but would advise whether they should Bayl him or no, and so remanded him to Prison.

Anonymus.

In an Assault; Battery and Wounding, the Plaintiff after Verdict moved the Court for an increase of Damages, the Court said they could not do it, if the word Maihemavit was not in the Declaration.

Clarkes Case.

Upon an Habeas Corpus to the Mayor, &c. of London, a Custom was returned to Disfranchise, and commit a Freeman for speaking opprobrious words of an Alderman.

The Court said, they might fine in such Case, but the other Custom would not hold, notwithstanding the Act of Confirmation of their Customs.

Termino

Termino *Paschæ*, Anno 30. Car. II.
In Banco Regis.

Anonymus.

In Trespass of Battery by Baron and Feme for beating of them both.

Upon Not guilty, the Verdict was for so much Damage for beating the Husband, and so much for beating of the Wife.

The Court said upon a motion to Arrest the Judgment, that the Plaintiff might release the Damages for beating of himself, and take Judgment for the other.

The King *versus* Mead.

An Information was brought against him, upon the Statute of 17 Car. 2. which restrains Non conformist Ministers, from Inhabiting within five miles of any City, Town Corporate or Burrough, that sends Burgesses to Parliament, &c.

After Verdict for the King, it was moved in Arrest of Judgment.

First, That the place of his Habitation was alledged to be within five miles of London; but it was said, that London sent Burgesses to Parliament, which not being in the Record, the Judges were not to take knowledge of. Sed non allocatur.

For the last words of sending Burgesses to Parliament, shall be referred only to Burroughs; and therefore the Act restrains them from dwelling in Corporations, &c. tho' such Corporations as send no Burgesses.

Secondly, It is alledged, that the Town where the Defendant dwells is within five miles; but not that the place of his Habitation in that Town was so, and therefore may be intended to be more remote.

Thirdly, There wants vi & Armis. Sed non allocatur, Sed Judicium pro Rege.

Termino.

Termino Sanctæ Trinitatis, Anno 30 Car. II.

In Banco Regis.

Memorandum, This Term Sir Richard Rainsford was removed, and Sir William Scroggs one of the Justices of the Common Pleas, was made Lord Chief Justice of the Kings Bench.

Anonymus.

In Trespals for Fishing in his several Piscary, and for taking 20 Bushells of Oysters there such a day continuando piscationem prædictam, from the said day to the time of the Action brought.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Fishing in the continuando was altogether incertain, not expressing the quantity or quality of the Fishes as it ought, according to Playters Case, 5 Co. And of this Opinion were Wild and Jones.

But the Chief Justice inclined to think it well enough, and said Playters Case had not been very well approved of of late years, and that is, that 'tis necessary to express the kind of the Fishes, which has been held since needless; and he knew not why it might not be, as well as an indebitatus Assumpsit pro diversis mercimoniis. But the other Judges said, tho' it was reason it should be as the Chief Justice said; yet they knew not how to depart from the Authorities in the Point, and that Playters Case had remained unshaken. Sed Adjornatur.

Anonymus.

In Debt for Rent against an Assignee of a Lessee.

The Defendant pleaded, That before the Action brought, he assigned over to J. S. and thereof gave notice to the Plaintiff.

The Plaintiff replied, That he still kept the Possession, and had made the Assignment by fraud to disappoint him, &c. To which it was demurred, for it was said, that fraud was not averrable in this case, neither by the Common Law nor any Statute.

But the Court inclined that it might, for if such a practice should obtain, the Lessor might be hindered perpetually of his Action of Debt, by making Assignments to persons unknown. An Executor confesses a Judgment, which is lawful for him to do; yet this may be abetted to be entered or kept on foot by fraud, and that
by

by the Comman Law which hates all frauds. Sed Adjornatur.
Postea.

Anonymus.

A Prohibition was prayed to the Council of the Marches, for that they proceeded upon an English Bill there against the Defendant; supposing that he had promised upon a Consideration to pay the Debt of a Stranger, because 'tis in the nature of an Action upon the Case, and consists meerly in Damages. And altho' many Presidents were shewn of their Proceeding in such of Actions, and the Statute of 34 H. 8. cap. 26. that they should determine such Cases as were heretofore accustomed and used, &c. as should be assigned to them by the Kings Majesty, and it was pretended that this was within their Instructions; yet the Court granted the Prohibition: For where Damages are uncertain, they cannot be set in a Court of Equity, but by a Jury. In Debt, because the demand is certain, the Courts here have sometimes assessed Damages without a Writ of Enquiry, but never in Trespas, or Actions upon the Case, which lie wholly in Damages,

Anonymus.

A Habeas Corpus, The Return was read and spoken to, and the Prisoner ordered to be remanded.

Vid. Mo.
839.

Twilden said, the Return should have been first Filed, and the Prisoner committed to the Marshalsey, for otherwise the Court have no power over him, and he cited 1 H. 7. Humphry Staffords Case, who being brought to the Bar upon an Habeas Corpus by the Lieutenant of the Tower, was committed to the Marshalsey, and afterwards remanded to the Tower; but the other Judges differed as to the Commitment, and said it was not necessary to keep the Prisoner in the Marshalsey until the Matter was determined, but he might be sent from time to time to the same Prison, and brought up by Rule of Court until he is either Bailed, Discharged or Remanded. And so they said it was lately done in the Earl of Shaftsbury's Case.

Gilmore *versus* . . .

Upon a Special Verdict the Point was, whether a Promise made upon such Consideration as by the Act of 29 Car. 2. to prevent Frauds and Perjury's is requisite to be in Writing signed by the Party, to be charged therewith, being made before the 24 of June last but the Action brought after, be within the restraint of the Act which saith, That from and after the 24 of June, no Action shall be brought upon such Promise, &c.

And

And it was resolved, that the Case was not within the Act, which did not extend to any Promise made before the 24 of June.

The King *versus* Sir Thomas Fanshaw.

Sir Thomas Fanshaw and others were indicted for not Repairing of a Bridge, which it was alledged they were bound to Repair Ratione Tenuræ of such Lands.

Sir Thomas Fanshaw pleaded, That he was not bound to Repair Ratione Tenuræ, and found that he was.

In Arrest of Judgment it was said, that the Verdict was not pursuant to the Indictment; for therein 'tis alledged, that Sir Thomas Fanshaw and others were bound to Repair Ratione Tenuræ and the Verdict is, that Sir Thomas Fanshaw Ratione Tenuræ, &c. Reparare debet Parietem prædict' modo & forma prout per Indictamentum prædict' supponitur.

Sed non allocatur, for each of them may be bound to Repair for their respective Lands, and they must get Contribution by the Writ de onerand' pro rata portione.

Secondly, It was said, that 'tis Ratione Tenuræ, and not said Suz, and this was said to be naught, Noy's Rep. 93.

Sed non allocatur, for the Presidents are generally so.

Parkers Case.

A Mandamus to restore an Attorney to his liberty of practising in a Court within the County Palatine of Chester; was Returned, That the Court was holden before the Chamberlain, Vice Chamberlain, Baron, or the Deputy of the Baron, and that at a Court before the Barons Deputy, he spoke contemptuous words of him, whereupon he suspended him from his Practice, & quod non aliter amicus fuit. Upon exceptions offered to the Return, The Court held it a good cause of Suspension; and ordered a Submission to him that received the affront in open Court, before that he should be restored.

Anonymus.

The Case upon the Averment of Fraud, upon an Assignment by the Assignee of a Lessee was now moved again, and by Twisden, Wild and Jones against the Opinion of Scroggs Chief Justice, Judgment was given for the Plaintiff, (*viz.*) That Fraud in such Case might be averred. Ante.

Anonymus.

In Ejectment, it was debated whether Confession of Lease, Entry and Ouster would serve, where there ought to have been an actual Entry upon the Title, as the in case of a Condition broken, or the like: And the Opinion of the Court inclined, that it would not, tho' my Lord Hale was said to be of another Opinion. Ante.

Termino Sancti Michaelis, Anno 30 Car. II.

In Banco Regis.

Dutton *versus* Poole.

Cujus principium ante, Michael' 29 Car.2. It was now moved again to stay the Judgment, by Sanders, who argued, that the Action could not be maintained by the Plaintiff; for the Father whose the Wood was, could only bring it, for it will be agreed he might have released it, or by cutting of the Wood, might have taken away all the right of Action.

Again, it does not appear by the Record that the Defendant was here, and so no benefit by the forbearing to cut the Wood. Rookwoods Case cited on the other side, 1 Cro. 163. 1 Leonard 192. 18; that the Promise was made to the younger Brothers, and the Consideration that they would consent; but here the Plaintiff who was to have the Money, had no share in the Consideration of Meritorious Act, as where the Father promises J. S. if his Son will Marry his Daughter he will give him 1000 l. the Son may bring the Action, because the Consideration moves from him, Herlys Rep. 20. the Case was to this effect, A Man promises a Woman whom he was to Marry upon a certain Consideration, that if he had a Son by her he should have a Term, (whereof the Woman was then possessed) and if it were a Daughter, she should have the Moiety of the Goods, &c. they Intermarry, and after the death of the Husband, the Daughter born between them brings an Action against the Executor of the Husband, and resolved that it would not lie, tho' they did not think the Agreement made with the Wife, to be discharged by the Intermarriage but only suspended, which is a Quære in my Lord Hobart: Yet the Daughter being no Party to the Promise, or to the Consideration, could not bring

bying an Action. The Case of Norris and Pine before cited is stronger, for there he that made the Promise had a benefit, for it was in Consideration of Marriage.

On the other side it was said, that tho' it doth not appear that the Defendant was Heir, yet it may be intended after Verdict, however 'tis not nudum pactum, for if the Defendant had no benefit, yet there was a restraint upon the other, and that is Consideration enough. And for the objection of releasing, that holds; where J. S. promises J. N. if his Son will Marry his Daughter he will pay him 1000 l. J. N. may Release; but 'tis doubtful whether he can after Marriage, because then 'tis vested in the Son, as Scroggs Chief Justice said, 1 Roll. 31. The Uncle of an Infant delivered J. S. 12 l. who promised to pay the Infant when he came of Age, and the Action was well brought by him after his Age. So Goods sold to A. to pay 10 l. to B. B. may Sue. Vid. 1 Roll. 32 Starkey and Mills.

The Court said it might be another Case, if the Money had been to have been paid to a Stranger; but there is such a nearness of Relation between the Father and Child, and 'tis a kind of Debt to the Child to be provided for, that the Plaintiff is plainly concerned. And so by the Opinion of them all, (*viz.*) Scroggs, Wild, Jones, and Dolben, *Judicium pro Querente*. Ante.

Anonymus.

A Prohibition was prayed to the Sheriffs Court of London; for that an Action was there Commenced, to which the Defendant pleaded, That the cause of Action did not arise within the Jurisdiction, and offered to swear his Plea; but it was refused. The Counsel for the Plaintiff objected against the Prohibition, that the Plea came too late, for it was after an Imparance. But it being proved by Affidavit, that the Plea was tendered within two days after the Declaration was delivered, and that immediately upon delivering the Declaration there is an Imparance of course, The Court granted the Prohibition, and said, that the other side might Demurr if they thought fit, for the liberty of the Subject was infringed by bying him within a private Jurisdiction, when the Matter arises out of it; and Attorney's in such places are sworn to advise no Plea to the Jurisdiction, (nor that none shall be put in by them.)

And whereas 'twas said, that the Party had not prejudice for he might remove his Case by Habeas Corpus.

So that the Court answered, coming by Habeas Corpus, Bail must be put in above, tho' the Cause otherwise did not require it.

Note, It appeared here, that there was no defence made in this to the Jurisdiction, and Co. Inst. was quoted, that defence should be made tho' not full defence: But the Court said it was not necessary, and that Presidents were otherwise, especially where the Court have no Jurisdiction of the matter, otherwise where not of the person.

James *versus* Richardson.

In Ejectment, the Case upon a Special Verdict was thus; A. devised the Lands to B. and his Heirs during the Life of J. S. and after to the Heirs of the Body of R. D. now living, and to such other Heirs as should after be Born; the Devisee for Life levied a Fine in the Life of him to whose Heirs the Remainder was limited, but he had a Son at the time of the death of the Testator. The question was, Whether it was a Contingent Remainder, the consequence whereof was to be destroyed by the Fine, and that it was vested in the Son. Scroggs Chief Justice, Wild and Jones held it a Remainder, vested by reason of the words now living, which was a sufficient Designation of the person that was to take in a Will, tho' improper to call him Heir: But Dolben Contra, for by this Construction the Heirs Born after are excluded, and the Son would take but an Estate for Life, tho' it were devised to the Heirs in the Plural Number.

Note, Upon a Writ of Error in the Exchequer Chamber, this Judgment was reversed, Hillary 31 & 32. Car. 2.

Termino

Termino *Paschæ*, Anno 31 *Car.* II
In Banco Regis.

A Mandamus was prayed to the Ecclesiastical Court, to grant the Probat of a Will under Seal, &c.

The Case was, the Executor named in the Will had taken the usual Oath, (but after a Caveat entered) and then Refused; and another endeavoured to obtain Letters of Administration; the Executor came after to desire the Will under Probat, and contested the granting of Administration: Which was Adjudged against him, supposing that he was bound by his Refusal.

And after an Appeal to the Delegates, this Mandamus was prayed, and granted by the Court; for having taken the Oath, he could not be admitted to Refuse, and the Ecclesiastical Court had no further Authority, and the Caveat did not alter the Case.

Note, The Oath was taken before a Surrogate; yet it was all one.

Anonymus.

A Prohibition was prayed to a Suit for Tythes upon the Suggestion, that the Lands out of which they were demanded lay out of the Parish, and the Bounds of Parishes are tryable at the Common Law.

But the Court denied the Prohibition, because it did not appear, that a Plea thereof had been offered in the Ecclesiastical Court.

Anonymus.

A Prohibition was prayed to stay a Suit against J. S. Lessee of a Rectory, out of which a Pension was demanded. It was suggested that the Lord Biron had three parts in four of this Rectory, upon which the Pension was chargeable, and that the Suit against one alone ought not to be, as in an Assize for a Rent-charge, all the Ter-Tenants are to be named, and here the party has an Election to Sue a Writ of Annuity, and if so he must have named all that had been chargeable.

Curia. 'Tis true, in our Law it were a good Plea in Abatement; but perhaps their Law and Course is otherwise. And here they have Jurisdiction, and may proceed according to their own Rules; or if not, you may have an Appeal. Whereupon a Prohibition was denied.

How

Anonymus.

In an Habeas Corpus and Certiorari for the Body of J. S. who had been Imprisoned for not paying of a Fine of 20 l. set at the Quarter Sessions: The Return was, that he being Constable, and demanded by the Court to Present an High-way, which was sworn before him by Two Witnesses to be out of Repair, said in Contempt of the Court, That he would not Present it: For which, and certain other contemptuous words the Fine was set.

The Counsel for the Prisoner moved, that it might be filed: Which was done.

The Court were of Opinion, that the Fine was not well set; for Constables are to Present upon their own Knowledge, and the Two Witnesses should have been carried to the Grand Jury, for the Constable was not obliged to Present upon their Testimony. This Court is to judge of their Fines, whether without Cause, or to mitigate them when excessively imposed; and for the Contemptuous Words the Return is ill, because not expressed what.

On the other side it was prayed, that the Return might be amended, for he had spoken Opprobrious Words; but that could not be admitted after the Filing. And so the party was discharged.

Anonymus.

It was moved to quash an Order of Sessions, for the Keeping of a Bastard Child.

First, That it doth not appear that the Child was born within the Parish.

Secondly, 'Tis to allow so much Weekly, until the Child is Eight years of Age; whereas the Statute gives power to make a Weekly allowance while the Child shall be chargeable.

Thirdly, The Order was, at Eight years old to pay 5 l. for the Binding of it out.

But the Court would not quash it; for they said it was implied, by saying, it would be chargeable to the Parish, that it was born there; and 'twas apparent it would continue Chargeable for so long as they appointed the Allowance, and they might Order 5 l. to be paid in the end.

Sed Quare, For a Sum in gross ought not to be set, but a Weekly allowance.

And the Court said, they must shew that respect to Justices of the Peace, who served the Country at their own charge as not too nicely to examine their Orders.

Anonymus.

Anonymus.

ERror upon a Judgment by Nihil dicit given in the Common Pleas, where the Action was for Words, which in the Declaration were laid thus: That the Defendant said, Quidam J. S. (which was the Plaintiffs Name) innuendo the Plaintiff was, &c.

The Error assigned was, that there was no Averment that these Words were spoke of the Plaintiff, for there might be more of the name.

But Holt for the Defendant said, the Innuendo would help that fault; and he cited the Case of Robotham and Venlecke in the 3 Cro. 378. where the Plaintiff Declared; that he had made an Oath before a Judge upon certain Articles exhibited for the Good Behaviour; and the Defendant to Scandalize him said, He made a false Oath, (Innuendo the said Oath before the Judge) where it was held, that the Innuendo was sufficient to ascertain what Oath was meant.

But the Court Reversed the Judgment in this Case, and said, that not saying in the Declaration that the Words were spoken of the Plaintiff, it was not sufficient to bring that in by an Innuendo, which ought to have been Averred; and it is the worse, because it is said quidam J.S. which imports another person than the Plaintiff.

Anonymus.

ERror to Reverse a Judgment given in the Kings Bench in Ireland, in a Prohibition, where the Issue was, whether he had Prosecuted in the Court Christian after the Prohibition? and it was found for the Plaintiff; and Damages assessed to 100 l. and 6 d. pro misis & custagiis.

And now the Error was assigned in the Judgment given, which was, That the Plaintiff should recover damna predicta per Juratores assess. ad 100 l. nec non pro misis & custagiis de incremento per Cur' adjudicat' 20 l. omitting the 6 d. Costs given by the Jury.

On the other side it was said, That damna predicta in the Judgment included all, and the saying 100 l. was but a Mis-computation. Et Adjornatur. Postea Hill. 33 & 34 Car. 2.

How

How *versus* Whitfield.

A Fine of certain Lands to the use of J. S. for Life, and after to his Executors and Assigns for 80 years, with Power to the Lessee and his Assigns to lett Leases for 21 years, reserving the ancient Rent.

After several mean Assignments, the Assignee of an Executor of an Assignee, made a Lease for 21 years, which in the Special Verdict was found to be made of the said Lands inter alia, reserving proinde six shillings per annum, and found that six shillings was the ancient yearly Rent for the Land.

The Court seemed to be of Opinion, that an Assignee after so many Removes might execute this Power, for it was coupled with an Interest, and annexed to the Estate, tho' to be construed strictly; but in regard the Lease was made of the Land inter alia, reserving proinde, &c. in case the Reservation should be taken to be for the whole Land, then it was not the ancient Rent reserved for this; and upon that they doubted. *Et Adjournatur. Postea.*

Anonymus.

A Indictment was quashed for want of Addition: For the Court said, no Process ought to go out thereupon, because the party cannot be Outlawed.

Anonymus.

In an Habeas Corpus the Return was, that the party was taken upon an Excom' Cap'.

It was moved, that the party might be discharged, because upon Search it appeared that the Writ had not been Enrolled in this Court; for so it ought to be by the Statute of the 5th of the Queen, tho' the Writ issues out of Chancery.

The Court doubted, whether they could Discharge him upon a Motion, or that he should be driven to plead this Matter? And it was said the Course had been both ways. *Vid. Parker's Case 3. Cro. 553.*

But the party was afterwards Discharged; ut opinor.

Horne

Herne versus Brown.

A Prohibition was prayed to a Suit in the Ecclesiastical Court.

The Libel sets out, That a Tax had been made for the Repairs of a Church where the Defendant inhabited, and was to make him pay his proportion. To which they required his Answer, (viz.) Whether he had paid, &c.

The Suggestion was, that the party had tendered his Answer, but the Court had refused it, because it was not upon Oath and that the Ecclesiastical Court cannot tender an Oath to the party sued, (nisi in causis Matrimonialibus & Testamentariis.)

But the Court, after hearing divers Arguments, denied the Prohibition; for they said, It was no more than the Chancery did, to make Defendants answer upon Oath in such like Cases.

Termo Sanctæ Trinitatis, Anno 31 Car. II.

In Banco Regis.

How versus Whitfield, ante in ult' Term.

In Repl the Plaintiff declares of the taking of his Cattle in a Close, containing five Acres.

The Defendant avows, and sets forth a Fine to the use of A. in Tail, which descended to him, Virtute cujus he was seised in Dominico ut de feodo talliato, &c.

The Plaintiff Replies, that the Fine was first to the use of J. S. for Life, the Remainder to his Executors, Administrators and Assigns for 80 years, with Power to him and his Assigns, to lett the five Acres in Possession or Reversion for 21 years, determinable upon three Lives, reserving the ancient Rent, and that J. S. Devised this Term to J. N. and died; his Executors assented, and after it came to the Executors of J. N. who assigned it; and that the Assignee made a Lease of the said five Acres inter alia, reserving proinde the Rent of 6 s. per annum, and avers that the ancient Rent was 6 s. per annum.

The Avowant Rejoyns, setting forth his former Title. And the Plaintiff Demurs.

It was Objected :

First, That the Plaintiff ought to have traversed the Seisin in Tail, alledged by the Avowant seeing in his Replication he sets up and titles himself under an Estate inconsistent with it.

To this it was Answered, and the Court agreed, that there ought to be no Traverse; for the Avowant doth not say, it was his Freehold, or that he was Seised in Tail; but only under a Virtute cujus, &c. And the Plaintiff in his Replication sets forth a Title consistent with all that the Avowant alledges, and so confesses and avows, and all depends upon the execution of the Power. And for that,

Secondly, It was Objected, That he which made this Lease was not Assignee of J. S. for Executors were not within the Power, and consequently not their Assignees? This is a Power collateral to the Estate, and shall not run with the Land; for then Assignees of Commissioners of Bankruptcy, the Vendee of the Term by the Sheriff upon an Execution, &c. should execute this Power. It is like Covenants annexed to Leases, which the Assignee could not take advantage of till 32 H.8.

Again, Here appears to be no good Reservation; for the Lease is of the five Acres inter al, reserving proinde, so that the Rent issues out of other Lands as well as the five Acres, and therefore cannot be said to be the ancient Rent reserved upon that.

The Court were all of Opinion, that the Assignee in this case might execute the Power, and conceived that Assignees might include Assignees in Law, as well as Fact; but however the Tenant for Life devising this Term, the Devisee was an Assignee, and the Power in the greatest strictness of acceptation was in him, and consequently must go to his Executors, and by the same Reason to their Assignee.

As to the Reserving the Rent proinde, the Court said it might be intended that the inter al might comprehend nothing but such things out of which a Rent could not be reserved, and then the six Shillings was reserved only for the five Acres. However the proinde might reasonably be referred only to the five Acres, and not to the inter al, and that a distinct Reservation of Six Shillings might be for five Acres. And so Judgment was given for the Plaintiff.

Ante.

Vid. Mo.
855.

Stoed versus Berrier.

ERror upon a Judgment given in the Court of Common Pleas upon a Special Verdict; the Case was to this effect,

J. S. made his Will in Writing, and devised Lands to his Son J. S. and his Heirs, and in the same Will gave a Legacy of 100 l. to his Grandson. The Son died afterwards in his Life time, after whose decease J. S. the Grandfather made a Codicil, wherein he gave away part of the Lands devised, as aforesaid, to a Stranger, and afterwards declared by Parol, that his Intention was that his Grandson J. S. should have the Lands, which his Son J. S. should have had.

The Question upon this Special Verdict was, Whether this were sufficient to carry the Lands to the Grandson? And Judgment was given in the Common Pleas by three Judges against one, that it was. Whereupon a Writ of Error was brought in this Court.

Finch Solicitor Argued, that this Will was sufficient to carry it to the Grandson. He agreed Brett and Rigden's Case in Pl. Com. that a Devise to a man and his Heirs, who dies in the Life of the Devisor, a new Publication will not be enough to make the Heir take by the Will, because named in the Will by way of Limitation of the Estate, and not Designation of the Person that should take. But in Fuller's Case in the 1 Cro. 423. and in Mo. 2. where the Devise was to his Son Richard and the Heirs of his Body; which Richard afterwards died in his Life time, and then the Devisor said, My Will is, That the Sons of Richard my Son, deceased, shall have the Land devised to their Father, as they should have had if their Father had lived and died after me. There Popham and Fenner held, that this new Publication would carry the Land to Richard's Son. Gawdy and Clench contra. But our Case is much stronger; for there Heirs of the Body were used only for Limitation; but in the Will here, where the words are, I Devise to my Son J. with this new Publication the Grandson J. may take, because a Grandson is a Son; and when a Will is new Published, it is all one as if it were wrote at the time of such Publication. Beckford and Parncor's Case in the 1 Cro. 493. Mo. 404. Devise of all his Lands, and after the Will the Devisor purchaseth other Lands, and then publishes it again, it will carry the new purchased Lands. Dyer 149. Trevanian's Case. Cestuy que use before the 27th of H. 8. Devised the Lands; a new Publication will pass the Lands executed in him by the Statute.

The Opinion of the Court inclined to Reverse the Judgment; they held it to be the same with Fuller's Case in the 1 Cro. that no Parol averment can carry Lands to one person, when the words of the Will plainly intended them to another. They agreed, If a man having no Son, but a Grandson, deviseth his Lands to his Son, the Grandson may take: But here is an opposition contained in the new Publication, (viz.) Those Lands which my Son J. should have had, my meaning is, my Grandson J. shall have. And in the Will it self there is a Legacy devised to the Grandson by that Name; so where they are so distinguished, 'tis impossible to take the Grandson to be meant by the name of Son. As to Beckford's Case, the Words are full to carry all, and therefore it had been impertinent to have wrote over the Will again. So where a man has two Sons named John, it may be well averred that he meant the younger Son; for nothing in the Will is inconsistent with such meaning.

The Court took time to deliver their Opinions. And afterwards the Chief Justice delivered the Opinion of the Court, That neither the Republication, nor Parol Declaration, could operate as a Devise to R.&c. the Grandson.

Pepis's Case.

A Mandamus to restore him to his Place of Recorder of the Town of Cambridge.

The Return was, That they were Incorporated by the Name of Mayor, Aldermen, &c. with a Power to chuse a Recorder, Habend' pro termino vitæ, aut ad voluntat' eligentium.

That Mr. Pepis was Chosen Recorder ad voluntat' eligentium; and that afterwards by the Votes of the greater number of the Electors he was removed, and the Lord Allington constituted a Recorder under their Common Seal, &c.

Upon this Return it was moved for Mr. Pepis, that altho' they had alledged a Power to Chuse a Recorder at Will, yet they should have shewn Cause for his Removal, being a Judicial Office, which the Court takes notice of; and that none had such a Power, but the King, to remove Judges ad libitum.

Again, A Corporation aggregate cannot determine their Will, but under their Common Seal, and that is not shewn here.

Corr. Where a Recorder is at Will, they may remove him at pleasure, as it is in Blagrove's Case, and several other Cases.

As

As to the other Point it does not appear that he was Constituted under their Common Seal, perhaps then they must have determined their Will under their Common Seal; but now 'tis well enough, my Lord Allington is Constituted under their Common Seal, which Act removes the other, so it was adjudged against Mr. Pepis.

Termino Sancti Michaelis, Anno 31 Car. II.

In Banco Regis.

A Prohibition was prayed to the Court of Admiralty upon a Suggestion, that the Suit was there upon a Contract made upon the Land. The Case was thus,

A Bargain was made upon the Land with several Seamen, to bring up a Ship from a Port in *England* to *London*, for a certain Sum to them to be paid. And so the Prohibition 'twas alledged, that this being upon the Land, and a Contract with divers jointly for a Sum in Gross, it could not be within the ordinary Rule of Mariners Wages, which is permitted to be Sued for in the Court of Admiralty, in favour of the Mariners, because they may all join in that Court, and not be put to the inconvenience of Suing severally, as they must at Law; but as this Contract is, they are to sue jointly at Common Law.

But the Prohibition was denied, for this must be taken as Mariners Wages. And therefore, tho' the Contract were upon the Land; yet they have Jurisdiction: Besides the Party comes after Sentence, and therefore in the Courts discretion, whether they will then grant a Prohibition.

Note, A Rump Act was made to enable Mariners to Sue for Wages in the Admiralty, but yet the Law was taken to be so before. Vid. 3 Cro.

Anonymus.

A Prohibition was prayed to the Ecclesiastical Court, where the Libel was for these words, You are a Whore, and Ply in Moorfields. And the Suggestion was, that the words were spoken in London, where an Action lies for such words; and for that Cause a Prohibition was granted, otherwise Suits might have been in the Court Christian for such words, tho' not singly for the word Whore being a common word of bhabling, otherwise where
joyned

joynerd with words, which shew the intent to Defame in that kind.

Anonymus.

A *Q* Indebitat' Assumpsit was brought for Goods sold and delivered. The Action was laid in London, and a Motion was made to change the Venue, upon an Affidavit, that the Sale was in Kent. But on the other side it was said, the delivery was in London, and that where the Matter consists of two parts in several Counties, the Plaintiff shall have his Election; to which the Court agreed.

Anonymus.

A Man Covenants with his intended Wife, to give her leave to dispose of so much by her Will, and then they Intermarry, the Husband having given Bond to a third person for the performance of these Covenants; after the death of the Wife, the Husband is Sued upon the Bond, for not permitting her Will to be performed: And upon Oyer of the Condition it was insisted on for the Defendant, that these Covenants were discharged by the Marriage, and so the Bond likewise loseth its force. Vid. Hob. 216. Et Adjournatur.

Anonymus.

A Motion was made to quash an Inquisition of forcible Entry; it was Inquisitio capta per Juratores super Sacramentum sum coram T. S. & J. N. Justiciariis, &c. qui dicunt super Sacramentum prædict'.

And it was objected, That qui dicunt, &c. referring to the last antecedent, it was that the Justices say: Sed non allocatur, for super Sacramentum prædict' makes it certain.

Note, The Caption of an Indictment may be amended the same Term it comes into Court.

Anonymus.

A *Q* Indictment for not taking upon him and executing the Office of a Constable, to which he was chosen by the Leet. The question was, Whether a Tenant in antient Demesne were obliged to that Office. And the Court held, that he was.

Termino.

Termino Sancti *Hilarij*, Anno 31 & 32 Car. II.

In Banco Regis.

Anonymus.

In Ejectment upon a Special Verdict the case was thus;
A Lease was made to A. and B. for their Lives, Remainder to the first Son of A. &c. Remainder to the Heirs of A. B. conveys his part to A.

The question was, Whether the Contingent Remainder to the first Son were destroyed.

Holt argued that it was. For a Contingent Remainder must have some particular Estate of Freehold to support it, and by the Release of B. his Estate was gone; and there became an intire Fee in A. For by whatsoever means a Joynt tenant for Life conveys his Moiety to his Companion, it does not enure by Grant of the Estate, but by Release, as *Eustace*, and *Scawens Case*, 2 Cro. 696. A. and B. Joynt tenants for Life, A. Leys a Fine to B. B. dies, there shall be no Occupancy of the Moiety of A. during the Life of A. Jones 55. and the Case of *Lewis Bowels*, 11 Co. is not to be objected, where an Estate for Life was made to B. and F. the Remainder to their first Son, that they should have in Tail, Remainder to B. and F. in Tail, here, tho' an Estate in Tail is executed in B. and F. until a Son Born; yet after upon the Birth of the Son, the Contingent Remainder shall vest and split, and divide the former Estate; but here the Fee becomes executed by several Con- 2 Co. 60. 61. veyances, but there the Estate Tail; was executed by the first Conveyance. And in the Case at Bar until the Release of B. the Fee was not executed in B. for the preservation of the Joynture, and so the Plight and Condition of the Estate altered by matter subsequent, and by consequence the Contingent Remainder destroyed.

The Court doubted, whether there were such alteration of the Estate, as to destroy the Remainder; for they said, to some purposes the Fee was executed before the Release, for if the Joynt-tenants had joynd in a Lease for years, an Action of Wast would lie against the Lessee. Ex Adjournatur.

Vid. 1 Inst.
184. a.

Anonymus.

Anonymus.

A Person who was committed to the Tower for Conspiring the death of the King, was brought up by Habeas Corpus, and prayed to have Bail taken, unless an Indictment were found against her this Term, according to the new Act of 31 Car. 2. for Habeas Corpus's.

The Court said, that they which would have the benefit of that Act, must pray it before the first week of the Term expires; but in regard it appeared, that she had prayed it before by her Counsel, and her Habeas Corpus was taken out in time, the Court said, the benefit of the Act should be saved to her, for the prayer is not necessary to be made in person: But Mr. C. G. was refused the advantage, he having omitted to make the prayer during the first week, either in Person or by Counsel.

Sir Robert Peytons's Case.

H E was brought up by Habeas Corpus from the Tower, his Counsel pressed much to have the Return filed, supposing that he would be then a Prisoner to the Court, and committed to the Marshalsey, but the Court ordered the Return to be filed, and notwithstanding remanded him to the Tower, as they said they might do.

The King *versus* Plume.

A Nte Hill. 29 & 30 Car. 2. The Case was spoken to again upon the Demurrer to the Indictment, for using of the Trade of a Fruiterer, contra 5 Eliz. not having been bound an Apprentice.

Scroggs Chief Justice and Dolben inclined to the Opinion, that it was a Mystery within the Statute, there being great Art in choosing the times to gather, and preserve their Fruit. And that the Cause deserved the more Consideration; for that the Fruiterers were an ancient Corporation in London, (*viz.*) From the time of E. 4. also a Barber, Upholster, and lately a Coachmaker, Ruled to be within the Act.

Jones and Pemberton, seemed to be of another Opinion, for it would be very inconvenient to make every one that sells Fruit by the penny within the Act, and majus & minus would make no odds; surely since the 5 of Eliz. there would have been some Prosecution by the Company of Fruiterers in this case, if it would have lain. Brewers and Bakers require Skill, and yet not within the Act. But the Court took time, to deliver their positive Opinions. Et Adjornatur.

Reve

Reve versus Cropley.

An Indebitat' Assumpsit was brought for 20 l. as Executor to William Burroughs, for so much of the said Williams Money had and received by the Defendant in his Life time; whereupon the Plaintiff had Judgment by Nihil Dicit, and upon a Writ of Enquiry, (the Plaintiff not being provided to prove the Debt supposing it to be confessed by the Judgment,) the Jury found but two pence Damages.

Ventris moved to set aside this Writ of Enquiry, for that the Plaintiff was not obliged in this Action to prove the Debt, at the executing of the Writ of Enquiry, no more than if he had brought an Action of Debt, 2 Cro. 220. In Trespas for taking of Goods, the Property is not to be proved upon the Writ of Enquiry after Judgment Sur Nihil Dicit; for said the Court, if he should fail thereof, it would be in destruction of the first Judgment. Vid. Yelv. 152,

Curia. This being in an Action upon the Case which lies in Damages, the Debt ought to have been proved, and so let it stand.

Note, If a Verdict be for 30 l. and the Judgment is quod recuperet damna prædicta ad 32 l. This surplus will do no hurt, because it is damna prædicta. Jones 171.

Cooke versus Fountain.

In an Ejectment upon a Trial at the Bar, the Title of the Lessor of the Plaintiff was upon the Grant of a Rent, with power to enter for Non payment.

The Executor of the Grantor was produced as a Witness for the Defendant. And it was objected against him, that in the Grant of the Rent, the Grantor covenanted for himself and his Heirs to pay it, and that the Executor being obliged, was no competent Witness.

Against which it was much insisted upon on the other side, that this Covenant annexed to a real Estate would not bind the Executor, but only the Heir.

But the whole Court were against it. The Counsel for the Defendant mentioned a Bill of Exceptions; and the Court doubted, whether it would lie in the Kings Bench, so they waved it, and shewed that the Executor had fully Administred the Inventory: But they gave a further charge on the Plaintiffs side, and so that Witness was set aside,

Termino Sanctæ Trinitatis, Anno 32 Car. II.

In Banco Regis.

Anonymus.

IN an Action upon the Case, The Plaintiff declared that he kept a Stage-Coach, and got his Livelihood by carrying of Passengers: And that the Defendant spoke such Scandalous words of his Wife, that so reflected upon him, and reproached him so ridiculous, that no body would Ride in his Coach, and he thereby lost his Customers.

After Verdict for the Plaintiff, It was moved to stay Judgment, that here was no cause of Action: But on the other side, a Case was cited of one Bodingly, 14 Car. 2. C. B. where the Plaintiff declared, That he was an Innkeeper, and that the Defendant had presented his Wife at a Lect for a Scold, and that such and such Guests in particular had absented from his House upon it, and after Verdict he had Judgment.

But the Court here said, that the Cases differed, for that quality of the Wives might make the House troublesome to the Guests; but a Stage Coachman could receive no probable prejudice in his Trade by defaming of his Wife, or at the least the Plaintiff should have declared, what Customers he had lost in particular, and therefore they ordered quod querens Nil capiat per Biliam.

Anger versus Brewer.

IN an Attachement upon a Prohibition, the Plaintiff declared, That he proceeded in the Court Christian, after the Prohibition delivered.

After Judgment by Nihil dicit, and 100 l. Damages given to the Plaintiff, it was moved to stay Judgment; that there was no place laid in the Declaration, where the Defendant prosecuted since the Prohibition delivered, and so if Issue had been taken upon Non prosecut' fuit post deliberat' brevis, whence should the Venue have come? But it being made appear to the Court, that in all the Presidents of these kind of Declarations, there is no place found mentioned of the Proceeding after delivery of the Writ, but the place only expressed where the Writ was delivered, they thereupon overruled this Specious Exception. Post.

Anonymus.

Anonymus.

One A. B. was indicted of High Treason in Conspiring the death of the King, and was brought to his Tryal at the Bar this Term, and one D. being produced a Witness against him; the said A. B. excepted against him, for that the said D. had been Outlawed of Felony and Burned in the Hand, and produced the Record.

The Witness to clear himself thereof produced the Kings Pardon, whereby he was pardoned of the said Crimes, Outlawry, &c.

The Prisoner still objected, that the Pardon did not restore him to his Credit; and that notwithstanding he was no legal and competent Witness, and prayed that he might have Counsel assigned him, to argue the Point which was granted: And the Court having heard his Counsel, and conceived some doubt in the Matter, they desired Mr. Justice Raymond to consult with the Judges of the Common Pleas, to which Court Raymond immediately went, and at his return reported to this Court the Opinion of the said Judges to be, that he might be Sworn. But if a Man convicted of Perjury were afterwards pardoned; yet that would not enable him to be a Witness, because it seemed to be an injury to the People, to make them subject to the Testimony of such an one. Vid. Hob. 81. a Pardon takes away poenam & reatum; so D. was Sworn.

Colepeppers's Case.

He was indicted of High Treason, for Raising Rebellion in Carolina, (one of the Kings Foreign Plantations in America) whereupon he was this Term Tried at the Bar and acquitted.

Note. By 35 H. 8. cap. 2. Foreign Treasons may be either tried by Special Commission, or in the Kings Bench by a Jury of the Country where that Court Sits. Vid. Co. 1 Inst. 261. b.

Anonymus.

Upon a Tryal at Nisi prius at Guildhal before my Lord Chief Justice North, in Trover and Conversion against an Executor de son tort.

The question came to be, Whether the Goods having been taken in Execution, upon a Judgment obtained against the Defendant by a Creditor of the Deceased, should discharge him against the Plaintiff, who brought this Action as Administrator: And the Opinion of the Chief Justice was, that this Execution was a good Discharge against another Creditor that should Sue him, to whom he might plead Riens inter ses mains, but it was no Discharge against an Administrator

nistrator, for Men must not be encouraged to meddle with a personal Estate without Right; but to prevent this mischief where the Party dies Intestate, and there is contest about the Administration, a Man may procure of the Ordinary Letters ad Colligendum.

Termino Sancti Michaelis, Anno 32 Car. II.

In Banco Regis.

Anonymus.

THe Statute of 43 Eliz. cap. 2. that enables Justices of Peace where a Parish is unable to provide for their Poor, to Tax the neighbouring Parish, the words being any other of any other Parish. It was resolved, that the Justices might impose the charge upon any of the Inhabitants of the neighbouring Parish, and were not obliged to put a general Tax upon the whole Parish.

Anger versus Brower.

A Prohibition, the Plaintiff declared upon an Attachment, that at such a day and place he delivered the Writ to the Defendant, and that he had prosecuted the Suit in the Court Christian since, and upon Judgment by Nihil dicit, and upon a Writ of Enquiry 100 l. Damages were found, and Judgment given, and a Writ of Error brought.

The Error assigned was, that the Plaintiff had laid no Venue where the Suiting was since the Writ delivered, which was the cause of Damage, and not the delivery of the Writ, so that place would not serve. On the other side it was said, that the Presidents were generally this way: But to that the Court said, that where those Presidents were, there was no further Proceeding after Judgment, as there seldom was when there was Judgment by Nihil dicit; but here they reversed it for this Error. Ante.

The Case of the City of ~~London~~, concerning the Duty of Water
Baillage.

The Mayor and Commonalty of London brought an Indebted Assumpsit against A. B. for 5 l. for so much due to them for divers Tons of Wine, brought from beyond the Seas to the Port of London, at four pence per Ton.

Upon Non assumpsit pleaded, and Trial at Bar, divers Freemen of London were offered as Witnesses for the Plaintiff. But the Counsel of the other Side excepted to them, for that they were Parties (the Commonalty of London comprehending all the Freemen, and likewise Interested.)

On the other Side it was said, that their Interest was in no sort to be considered, it being so very small and remote; a small Legatee hath been sworn to prove a Will. In an Indictment against the County for not Repairing of a Bridge, one of the County may be a Witness (and this Justice Dolben said, he had known in the Case of Peterburgh Bridge.) In a Robbery for Statute de Winton, the Plaintiff shall be sworn a Witness, and that for Necessity.

But it was Replied, that there was no Necessity, for they might have other Witnesses besides Freemen, (tho' perhaps with difficulty.) In an Action against the Hundred upon the Statute of Winton, an Hundredor cannot be a Witness.

Scroggs Chief Justice, Dolben and Raymond, were of Opinion, that they were Witnesses.

Jones contra. And a Bill of Exceptions was tendered by the Counsel for the Defendant, which the Court profered to Seal, and to allow three or four days time to Draw it up.

But afterwards the Plaintiffs Counsel offered other Witnesses, and set by their Citizens; but the Verdict went for the Defendant.

Note, It was said, that the Lord Mayor could not Release the Action but under the Common Seal; and that for a Duty or Charge upon a Corporation, every particular Member thereof is not liable, but Process ought to go in their Publick Capacity.

Note, A Sheriff was ordered to attend the Court for demanding an excessive Fee for the execution of an Hab' fac' possell. the Court saying there was none due.

Anonymus. *to vifit the to the*

A Prohibition was granted to the Consistory Court of the Bishop of London, for Citing one for calling of her Whore; because such words by the Custom of London are punishable in the Courts of Law there.

Anonymus.

If the Plaintiff dies after the Term began, tho' before Judgment Entred; yet Judgment may be Entred, because every Judgment relates to the first Day of the Term.

Anonymus

A Motion was made to quash an Inquisition taken before the Coroners super visum corporis, of one that killed himself, which found that he was Felo de se.

But the Court were Informed, that the party was Non compos mentis, and that there had been an undue Practice by the Coroner; of both which great Proof was made, and upon that it was quashed.

Note, The Court said, that if the Body could not be digged up, there might be an Indictment Exhibited to the Grand Jury, who might Enquire thereupon.

Termino

Termino Sancti *Hilarij*, Anno 32 & 33 Car. II.

In Banco Regis.

Anonymus.

A Motion was made against a Judge of an Inferiour Court of Record, for increasing upon a View the Damages in an Action of Treipass and Battery to so much more than was given by the Jury.

Curia. The proper way is to Reforme it by a Writ of Error; for none but the Courts at Westminster can increase Damages upon View.

Anonymus.

If a Writ of Error in Ejectment, &c. abates by the Act of God, a second Writ will be a Superfedeas. Otherwile where it abates by the Act of the Party.

Anonymus.

In a Writ of Error to Reverse a Fine, the Proclamations were pleaded in the same Fine, and five years quiet possession, and this in barr of a Writ of Error.

The Court Inclined, that the Error being in the Fine, five years possession could not be pleaded. Sed Adjournatur. Mo. Rep. 8.

Termino

Termino *Pasche*, Anno 33 Car. II.

In Banco Regis.

NOte, This Term Sir Francis Pemberton was made Lord Chief Justice of the Kings-Bench, in the room of Sir William Scroggs, who was displaced.

Page *versus* Denton.

Hill. 32 & 33 Car. 2. Rot. 45. In Debt upon a Bond against an Executor, who pleads that the Testator was Indebted to him by an Obligation, the Condition whereof was to pay Rent; and that at the time of his Decease there was 300 l. due for Rent, and that he had not more than 60 l. Assets to pay it, &c.

The Plaintiff Replied, That there was but 30 l. due for Rent at the time of the Testator's death.

Which the Court held to be a good Replication, altho' the Penalty of the Bond was forfeited at the time of the Testator's death. For if a Bond due to a Stranger be forfeited, and this be pleaded by an Executor, and that he hath not Assets ultra, 'tis a good Replication to say, That the Obligee would have taken part of his Money in full, and it shall be a Bar for no more; and here the Defendant ought to take but his due Debt.

And the Court said, that if men would plead their Case Specially, it would save many a Suit in Chancery.

Fitzharris's Case.

EDward Fitzharris was Indicted of High Treason; upon which being Arraigned, and demanded to plead, he delivered in a Paper containing a Plea to the Jurisdiction of the Court; which could not be received, (as the Court said) not being under Counsel's Hand. Whereupon he prayed to have Counsel assigned, and Named others, whereof the Court assigned four. And he was taken from the Bar, three or four days being given him to advise with his Counsel, to prepare his Plea as they would stand by him.

The Counsel prayed, that they might have a Copy of the Indictment.

But the Court denied it and said, that it was not permitted in Treason, or any other Capital Crimes.

But

But Justice Dolben said, that sometimes it had been allowed to take Notes out of the Indictment. Vid. Mirror 304. Abusio est que Justices ne monstre l'Indictment à les Indictes s'ils demandront. Sect. 115.

Termino Sanctæ Trinitatis, Anno 33 Car. II.

In Banco Regis.

Anonymus.

In an Action of Debe against an Executor, in the Debet and Detinet, upon a Surmise of a Devastavit, the Defendant was held to Special Bail. And so Ruled upon Motion.

Anonymus.

It was said by the Court, That if a Corporation that hath been by Prescription, accept a New Charter, wherein some alteration is of their Name, and likewise of the Method in the Governing part; yet their Power to remove (and other Franchises which they had de temps d'ont, &c.) do continue. And if the Power to Remove be at their Will and Pleasure, this Will must be expressed under their Common Seal; but in a Return to a Mandamus, debito modo amotus may suffice.

Note, No Writ of Error lies upon an Indictment of Recusancy and Conviction by Proclamation.

Note, In an Ejectment, where there are divers Defendants which are to Confess Lease, Entry and Ouster; if one does not appear at the Trial, the Plaintiff cannot proceed against the rest, but must be Nonsuit.

Termino Sancti Michaelis, Anno 33 Car. II.

In Banco Regis.

Anonymus.

In Covenant, the Plaintiff Declared upon several Breaches, one whereof was, for not paying of 7 l. according to the Covenant.

It was moved for the Defendant, that he might be admitted to bring 7 l. into Court to pay to the Plaintiff, together with his Costs hitherto, &c. as is usual in Cases of Debt or Assumpsit for Money, and that the Plaintiff might proceed for the rest, if he thought fit: But the Motion was denied, because the Plaintiff had Declared of other Breaches, and the Matter lay in Damages.

Anonymus.

Error upon a Judgment in the Common Pleas, where the Plaintiff Declared in an Action upon the Case, that he had Common in the Defendants Lands, & habere debuit, &c.

The Defendant Demurred, because not set out how the Plaintiff was Intituled to the Common, whether by Prescription, or otherwise. Notwithstanding which Judgment in the Common Bench was for the Plaintiff, and now the same Matter insisted on for Error here; and the Court doubted.

To make the Declaration good there was quoted the Case of Sands and Trefusies, in the 3 Cro. in an Action for Stopping of a Watercourse to his Mill, which was held good without saying an Ancient Mill, or that he was Intituled to the Watercourse by Prescription, or otherwise. 2 Cro. 43. 122. Dent and Oliver, an Action for disturbing of him to take Toll, and no Title set forth. Sed Adjournatur. Vid. Co. Entr. 9. 11.

Day versus Copleston.

In an Assumpsit for Money, the Defendant pleaded the Statute for the Discharge of poor Prisoners, and that he had been Discharged by that Act; which provides, that there shall be no after Prosecution by a Creditor in such case, so as to subject the Body to Execution; and says, that he can say nothing further in Bar of the Action.

Upon

Upon which the Plaintiff Demurred, and the Defendant joyned in the Demurre, and Judgment was Entred up for the Plaintiff; but with a Coffer executio quoad Corpus, &c.

And the Court approved of this way of pleading the Statute; for otherwise they said, if the Matter had not been disclosed in pleading, they doubted whether they could have given the Defendant the benefit of the Act, but he would be witten to his Audita Querela.

Anonymus.

Error of a Judgment in the King's Bench in Ireland, it was suggested, that the Plaintiff was in Execution upon the Judgment in Ireland.

And the Court seemed to be of Opinion, that a Habeas Corpus might be sent thither to remove him; as *Utrius* Mandatory had been awarded to Calais, and now to Jersey, Guernsey, &c.

Anonymus.

The Case was, A. Tenant in Tail, Remainder to B. in Tail, &c. A. makes a Lease for the Life of the Lessee, not warranted by the Statute, and dies, leaving B. in Remainder his Heir. B. lets for 99 years, to commence after the death of the Tenant for Life, reserving Rent; and then the Tenant for Life surrenders to B. upon Condition, and dies. B. suffers a Recovery with single Voucher, and dies; the Lessee for years enters; the Heir of B. distrains for the Rent, and the Lessee brings a Replevin; and upon an Avowry, and Pleadings thereupon, this Case was disclosed to the Court of Common Bench, and Judgment given there for the Avowant, and Error thereupon brought in this Court.

For the Plaintiff in the Error, it was Argued, That the Lease being derived out of a Reversion in Fee, which was Created in A. upon the Discontinuance for Life, and the New Fee vanishing by the Surrender of the Tenant for Life, (so it was urged, he was in his Remitter, altho' the taking of the Surrender was his own Act) that the Lease for years by consequence was become void.

Again, It was Objected against the Common Recovery, that the Tenant in Tail, and a Stranger which had nothing in the Estate, were made Tenants to the Praeipe, and therefore no good Recovery.

Again, In case B. were not remitted after acceptance of the Surrender, then he was Seised by force of the Tail, and so no good Recovery, being with single Voucher.

On the other side it was Argued to be no Remitter, because the acceptance of the Surrender was his own Act, and the Entry was taken away. But admitting it were a Remitter, because by the Surrender the Estate for Life (which was the Discontinuance) was gone, and it was no more than a Discontinuance for Life: for if Tenant in Tail lets for Life, and after grants the Reversion in Fee; if the Lessee for Life dies after the Death of the Tenant in Tail, so that the Estate was not executed in the Grantee, during the Life of the Tenant in Tail, the Heir shall immediately Enter upon the Grantee of the Reversion. Co. Litt. It seems also to be stronger against the Remitter in this case, because 'tis not Absolute, but only Conditional. However the Lease may be good by Estoppel; for it appears to have been by Indenture; and if the Lessor cannot avoid the Lease, the Lessee shall without question be subject to the Rent.

But it was Objected against the Estoppel, that here an Interest passes, and the Lease was good for a time: As if the Lessee for Ten years makes a Lease for Twenty years, and afterwards purchaseth the Reversion, it shall bind him for no more than Ten.

To which Pemberton Chief Justice said, The difference is; where the party that makes the Estate, has a Legal Estate, and where a Defeasible Estate only; for in the latter a Lease may work by Estoppel, tho' an Interest passed, so long as the Estate (out of which the Lease was derived) remained undefeated.

As to the Recovery, it was held clearly good, altho' a Stranger that had nothing in the Land, was made Tenant to the Praecipe with the Tenant in Tail; for the Recompence in Value shall go to him that lost the Estate, and being a Common Assurance, 'tis to be favourably Expounded. Et Adjournatur.

Termino

Termino Sancti Hillarij, Anno 33 & 34 Car. II.

In Banco Regis.

Anonymus.

In Error upon a Judgment, in Ejectione Firmæ in the Common Pleas, where the Case was, That the Bishop of London was seized in jure Episcopatus of a Mannor, of which the Lands in question were held, and time out of mind were demised and demisable by Copy of Court Roll for Life, in Possession and Reversion; and J. S. being Copyholder for Life in Reversion, (after an Estate for Life in Ann Pitt) and J. N. being seized of the Mannor by Disseisin, J. S. at a Court holden for the Mannor in the name of J. N. surrendered into the Hands of the said J. N. (the Disseisor Lord.) to the use of the said Lord. Afterwards the Bishop of London entered, and avowed the Disseisin. Ann Pitt died, and an Ejectment was brought by J. S. And it was adjudged in the Common Bench that he had a good Title; and now upon a Writ of Error in this Court, the Matter in Law was insisted upon by Pollexfen for the Plaintiff, in the Writ of Error.

That this Surrender to the Disseisor Lord to the Lords own use was good; for all the Books agree, a Copyholder may Surrender to a Disseisor of the Mannor, to the use of a Stranger, and why not to the Lords own use? As if Lessee for years be ousted, and he in Reversion disseised, and the Lessee Releases to the Disseisor, this extinguishes his Term. Here is a compleat Disseisin of the Mannor by Attornment of the Freeholders, (without which the Services cannot be gained) and the Copyholders coming to the Disseisors Court, and by making Surrenders, &c. owning him for their Lords tantamounts.

Serjeant Maynard contra. And he insisted, that this Surrender was not good, for the Disseisor had no Estate in this Land capable of a Surrender; for the Copyholder for Life continuing in Possession and never having been ousted, there could be no Disseisin of that. And he endeavoured to distinguish it from a Surrender to a Disseisor Lord to the use of another; for in such Surrenders the Lord is only an Instrument, and does but as it were assent, and until admittance the Estate is in the Surrenderer. And he resembled it to the Attornment of a Tenant, when (2 converso) a Seignior is granted; and he put Cases upon Surrenders of Leases, that they must be to one that hath the immediate Reversion, as an under Lessee for part of the Term cannot Surrender to the first Lessor; and he

cited

cited a Case of Lessee for years, Remainder for Life, Remainder in Fee to a Stranger, he that had the Fee enfeoffed the Tenant for years by Deed and made Livery; and the Conveyance held void, for it could not work by Livery to the Tenant for years, who was in Possession before; and a Surrender it could not be, because of the intermediate Estate for Life; and it could not work as a Grant for want of Attornment. He said it had been commonly received, that a Common Recovery cannot be suffered, where the Tail is expectant upon an Estate for Life, (not made Tenant to the Præcipe) which he said was true in a Writ of Entry, in the Post which are commonly used. And the true reason is, because such Writ supposes a Disseisin, (which cannot be when there is a Tenant for Life in Possession.) But as he said, a Common Recovery in such case in a Writ of Right would be good.

Pemberton Chief Justice said, his reason of Disseisin would overthrow Surrenders to the use of a Stranger, for if the Possession of the Copyholder would preserve it from a Disseisin, then was it pro tempore lopped off, or severed from the Mannor, and then no Surrender could be at all. *Et Adjournatur.*

Berry versus Bowes.

In an Ejectment upon a Special Verdict, the Case appeared to be this.

Commissioners of Bankrupt had assigned by Indenture the Lands in question to the Lessor of the Plaintiff, which Indenture was afterwards Enrolled: But the Declaration was upon a Demise made after the Indenture, and before the Enrolment, and whether that Demise were sufficient to Entitle the Lessor of the Plaintiff, was the general question.

It was first insisted on, that Enrolment of the Deed of Assignment, tho' to pass Lands, was not necessary, 2 Co. 26. But that the Court overruled, saying, that Enrolment is not requisite upon an Assignment of Goods, but of Lands it is: But then it was said, that after the Deed was Enrolled it shall relate to the Delivery; and it was compared to a Bargain and Sale, where by the Statute of H. 8. of Enrolments, nothing passeth till the Deed be Enrolled; but then it relates 2 Inst. 675, Bargainee sells before Enrolment, the subsequent Enrolment makes it good; so if the Bargainee suffers a Recovery before Enrolment, he is a good Tenant to the Præcipe, by relation, *ibidem*: And this is confirmed by the common practice. So if at Common Law a Recognizance be acknowledged before a Judge, (as any Judge of the Courts at Westminster may take a Recognizance) and afterwards he causeth it to be Recorded, it binds the Land from the time of the Caption, Hob. 196. If Land be conveyed to the King by Deed Enrolled, it

it binds from the time of the executing of the Deed, altho' the Enrolment be sometime after.

Sanders contra. Here the Commissioners are under a Power given to them by the Statute of Bankrupts, and they must execute that Power in all Circumstances before it become effectual. In the case of Enrolment of a Bargain and Sale the Deed it self passeth the use, and the Statute of Enrolments obstructs the operation of it till Enrolment; but when that is done it passeth by the Deed. Again, here needs no relation to avoid the mischief of mean Assignments from the Bankrupt, because he is restrained from the time of his first Act of Bankruptcy. And on the other side the mischief would be very great, if there should be a relation from the Enrolment, in regard the Statute limits no time for the doing of it, so that it may be seven years after; and if this should relate to punish Mesne Trespasses, the inconvenience would be very great, for such Trespassers are, until the Enrolment, exposed to the Actions of the Bankrupt. As to the Case of the Recognizance, the Caption is a judicial Act and the principal, and so binds from the time. And in the case of granting to the King by Deed enrolled, the reason is, because the King shall not receive any prejudice by the Laches of his Officer in neglecting to Enrol the Deed. But generally in Cases at Common Law there is no relation, as in Case of Feoffment and Livery, but stronger in Case of a Grant of Reversion, where the Attornment is but the assent of the Tenant; yet it shall not relate to the Grant. It would be hard, if a Relation should be admitted to make a Man liable to Trespass. It has been much doubted, whether a Bargainee before an actual Entry, can maintain an Action of Trespass.

Curia. The Case of Bellingham and Alfop, altho' it was said to be reversed, and the authority is cited in Wham and Morris Case, 3 Cro. Yet it has been since taken for good Law in the main point, where Executors sell by an authority given by Will, the Vendee is in the per from the Devisor, but here in Post the and by the Statute. It were very inconvenient to admit of Relation, because no time prefixed for the Enrolment. Sed Adjournatur.

Afterwards Judgment was given for the Defendant.

Anonymus.

Upon a Writ of Error out of an inferior Court, in an Action upon the Case, upon an Agreement to Assign over a Term, which the Defendant had in him for four years. Upon Non Assumpsit a Special Verdict was found, that the Agreement was made, but not put into Writing, and they found the Clause in the Act of 29 Car.2. of Frauds and Perjuries, (viz.) No Action to be brought upon any Contract or Sale of Lands, &c. or any Interest in or concern-

concerning them, &c. Upon which Special Verdict found, it was adjudged for the Plaintiff, and now Error was assigned in the Writ in Law, that this Contract was within the Act to be put in Writing: But it was objected, that the Statute extended only to Interests created de novo out of an Estate, and not to an Assignment.

Curia contra, And held the Case to be plain within the words of the Act, and so the Judgment was reversed.

Anonymus.

In Error to Reverse a Judgment given in an inferior Court.

First, Because 'tis said Cur' rent' apud Guildhall' Burgi, &c. and not said, that the Guildhal was within the Jurisdiction of the Court. Sed non allocatur, for that shall be intended.

Secondly, The Damages given by the Jury were 3 l. 19 s. and Costs 6 d. and so much for Costs de incremento adjud', and nothing said of the 6 d.

Sed non allocatur, because damna per Jurator' assess' includes all, and the other is but miscomputation, and the Costs awarded de incremento necessarily implies the 6 d. Costs before included. Vid. Ante Pascha, 31 Car. 2.

Anonymus.

In an Action upon the Case the Plaintiff declared, That the Defendant did take out a Latitat 21 Januarij, 32 Regni, ac etiam Billas, &c. whereas he owed him nothing.

Upon Not guilty pleaded a Special Verdict was found, that the Latitat was Teste 28 Novembris, 32 Car. Regis, but was really taken out 21 Januarij, 32 Regis. Et si pro Quære, &c.

Holt argued upon this, that by Law it must be said to be taken out the 28 of November, when the Teste is, Yelv. 130. Debt upon a Bond bearing date the 30 of December, The Defendant demands Oyer of the Condition which was to perform Covenants; and says, tho' it were dated the 30 of December; yet it was deliberat' primo die Feb' and no breach since. If the Plaintiff replies and agrees with the Defendant 'tis a Departure, because he had declared of a precedent Date, which implies the Delivery.

But it is objected, That the Jury are not estopped to find the Truth.

I answer, Where the Parties impleading have agreed a Point certain, the Jury is estopped to find the contrary.

Pemberton

Pemberton Chief Justice, we know the course of the Court is to Teste Latitars taken out in Vacation of the Term preceding; and the course of a Court is the Law of the Court. He might have declared; That the Defendant Sued out a Latitar the 21 of January, Teste the 28 of November preceding, and if he be not estopped to declare so, surely the Jury may find the whole matter. And so Judgment was given pro Quer.

Termino Paschæ, Anno 34 Car. II.

In Banco Regis.

Clayton *versus* Gillam.

In Trespals for breaking and entering of his Close, and Feeding, &c. and laying thereon certain pieces of Timber, &c. Ex continuando Transgressionem præd.

After Verdict for the Plaintiff it was moved in Arrest of Judgment, that one of the Trespasses, (*viz.*) The laying of Timber could not be with a *Continuando*.

But it was resolved by the Court, that continuando transgressionem præd shall be referred only to the Trespasses, which may properly be said with a *continando*. But if the continuando had been expressly laid for that Trespass, all would have been naught; as it was resolved in a Case in this Court, between Letchford and Elliot, 16 Car. 2.

The Earl of Shaftsbury *versus* Cradock.

In an Action of Scandalum Magnatum for saying, That the Earl was a Traytor, &c. The Action being laid in London where the words were supposed to be spoken: It was moved in behalf of the Defendant, that the Venue might be changed into some other County, and Affidavits were read, that the Plaintiff had a great interest in the City, and an intimacy with the present Sheriffs, so that the Defendant could not expect an indifferent Tryal there; and thereupon the Court did think fit to take the Cause out of London, and gave the Earl the Election of any other County; but he refused to Try it elsewhere, and would rather let the Action fall.

Curtis versus Inman.

IN Debe for the Penalty forfeited by the Statute of 5 Eliz. for using the Trade of a Grocer, having not been Bound an Apprentice.

It was moved, that the Action lies not in this Court, because 21 Jac. cap. 4. Enacts, That Actions popular shall be brought before Justices of Assize, of the Peace, &c. But a Case was cited, which was adjudged in this Court, Hill. 20 & 21 Car. 2. between Barns and Hughes (which see before,) that such Action would lie. But the Court notwithstanding in this Case said, they would hear Arguments.

The Earl of Shaftsbury versus Graham. & al.

IN an Action upon the Case, in the nature of a Conspiracy the Declaration was, That the Defendants did conspire to indict the Plaintiff of High Treason, and for that purpose did Solicit one Wilkinson; and endeavoured to Suborn him to give false Testimony against the said Earl, and an Indictment was offered at the Sessions at the Old Baily in London, by the Defendant in pursuance of the said Conspiracy, which Indictment the Grand Jury there found Ignoramus, &c.

It was moved in behalf of the Defendants, that whereas the Conspiracy was in the Declaration alledged to be in London; that the Court would change the Venue, and an Affidavit of the Defendants was produced, That the Conspiracy alledged in the Declaration, if there were any such, was in Surry, and not in London.

(Note, Wilkinson at the time of the supposed Conspiracy was a Prisoner in the Kings Bench,) and Affidavits were produced likewise to shew, that the Plaintiff had such Interest with the present Sheriffs of London, that an indifferent Jury was not like to be returned, and that several Persons named to be material Witnesses for the Defendant, durst not come to the Tryal if it were in London, for fear of their Lives, in regard they had been so affronted and abused, when they were produced to prove the before mentioned Indictment at the Old Baily, and several other matters were alledged. But it was insisted upon by the Counsel for the Earl That,

First, The Venue uses not to be changed in Case of a Peer, who is one of the Comites Regis, and shall not be forced to Travel into another County, to trie his Case as a Common Person.

Secondly, That the present Case was local, (viz.) The preferring the Indictment at the Old Baily, and where the Cause of Action ariseth in two Counties, the Plaintiff hath his Election to bring it in either, 7 Co. Bulwers Case. But

But the Court declared that they were satisfied, that no indifferent Tryal could be had in London; they remembered they were affronted themselves, when they were at the Old Baily upon the before mentioned Indictment: And they resolved, that they had a power to alter the Venue in the case of a Peer, as it had been done about six years since in a Scandalum Magnatum, brought by the Earl of Salisbury in this Court. And also they said, that the Cause of Action here was Transitory, (*viz.*) The conspiring, and that the preferring of the Indictment was but in aggravation of Damages, and the Action would lie altho' none had been offered, or if preferred by other Persons than the Conspirators.

'Tis true, when the matter ariseth in several places the Plaintiff has Election, but if there be like to be no indifferent Tryal in the place where it is laid, 'tis usual with this Court to change the Venue. But the Court said, they would not confine the Plaintiff to Surry, if he could shew cause that that was not an indifferent County Vid. 42 Ed. 3. 14.

Termino Sancti Michaelis, Anno 34 Car. II.

In Banco Regis.

Denison *versus* Ralphson.

IN an Action upon the Case the Plaintiff declared, That the Defendant in consideration of a Sum of Money paid by the Plaintiff, did promise to deliver to him ten Pots of good and Merchandizable Pot Ashes, and that not regarding his Promise, and to defraud him he delivered him ten Pots of Ashes not Merchandizable, but mixed with Dirt, &c. And declared also, that pro quadam pecuniae summa, &c. the Defendant vendidit to the Plaintiff ten other Pots of Ashes, Warrantizando, &c. that they were good and Merchandizable, and that he delivered them bad, and not Merchandizable, knowing them to be naught; and to this Declaration the Defendant Demurred.

And it was argued by Sanders, That here were Causes of Action of several Natures put into one Declaration, and they requir'd several Pleas, (*viz.*) Non Assumpsit, and Not guilty, and therefore ought not to be joyned.

Thompson for the Plaintiff, cited a Case between Matthews and Hoskin. An Action against a Common Carrier, and declared upon the Custom of the Realm, and that he had not delivered the Goods;

and declared also in a Trover and Conversion upon the same matter, and after Verdict upon motion in Arrest of Judgment, the Action was adjudged well brought, 16 and 17 Car. 2. Hill. in this Court. So an Action against one for twenty Shillings, upon the Hire of an Horse, and declared further, that he abused him, and held good.

Curia. Those Cases were after Verdict. Causes upon Contract which are in the Right, and Causes upon a Tort cannot be joyned, for they do not only require several Pleas, but there is several Process, the one Summons, Attachment, &c. the other Attachment &c. These upon the Contract lie for and against Executors, the other not; but these seem to be both upon the Contract, (*viz.*) That upon the Warranty as well as the other, tho' the Declaration saith, knowing them to be naught, yet the knowledge need not be proved in Evidence. Debt upon a Bond, and a mutuum may be joyned in one Action; yet there must be several Pleas for Nil debet, which is proper to the one, will not serve in the Action upon the Bond. Sed Adjournatur.

Termino Sancti Hillarij, Anno 34 & 35 Car. II.

In Banco Regis.

Anonymus.

A Quo Warranto was brought against divers persons of the City of Worcester, who they claimed to be Aldermen, &c. of the said Corporation. The Cause came to be tried at the Bar, and a Challenge was made to the Jury in behalf of the Defendants, for that the Jury men were not Freeholders.

The Court said, that for Juries within Corporate Towns, it hath been held, that the Statutes that have been made, requiring that Jurymen should have so much Freehold, do not extend to such places, for if so, there might be a failure of Justice, for want of such Jurymen so qualified; but then to maintain the Challenge it was said, by the Common Law Jurymen were to be Freeholders.

But the Court overruled the Challenge; but at the importunity of the Counsel, they allowed a Bill of Exceptions, and so a Verdict passed against the Defendants; and afterwards it was moved in Arrest of Judgment upon the Point: But the Court would not admit the

the Matter to be Debated before them (tho' divers Presidents of like nature were offered) because they said, they had declared their Opinions before, and the Medys might be upon a Writ of Error.

Termino Sanctæ Trinitatis, Anno 35 Car. II.

In Banco Regis.

Anonymus.

A Motion for a Prohibition to a Suit in the Ecclesiastical Court for a Churchwarden's Rate, suggesting that they had pleaded, That it was not made with the Consent of the Parishioners, and that the Plea was refused.

The Court said, That the Churchwardens (if the Parish were Summoned, and refused to meet or make a Rate) might make one alone for the Repairs of the Church, if needful; because that if the Repairs were neglected, the Churchwardens were to be Cited, and not the Parishioners; and a Day was given to shew Cause, why there should not go a Prohibition.

Termino

Termino Sancti Michaelis ; Anno 35 Car. II.

In Banco Regis.

Gamage's Case.

ERror out of the Court of the Grand Sessions, where in an Ejectment the Case was upon Special Verdict upon the Will of one Gamage, who devised his Lands in A. to his Wife for Life, Item his Lands in B. to his Wife for Life, and also his Lands which he purchased of C. to his Wife for Life, and after the decease of his Wife he gave the said Lands to one of his Sons, and his Heirs.

And the Question was, Whether the Son should have all the Lands devised to the Wife, or only those last mentioned? And it was Adjudged in the Grand Sessions that all should pass. And upon Error brought it was Argued, that they were Devises to the Wife in distinct and separate Sentences, and therefore his said Lands should be referred only to the last.

On the other side it was said, that the word Said should not be referred to the last Antecedent, but to all. If a man conveys Land to A. for Life, Remainder to B. in Tail, Remainder to C. in forma prædicta, the Gift to C. is void, 1 Inst. 20. b. It is agreed, if he said All the said Lands to his Son and his Heirs, it would have extended to the whole: This is the same, because Indefinitum equipollet universali. Et Adjournatur.

Herring versus Brown.

IN an Ejectment upon a Special Verdict the Case was, Tenant for Life, with several Remainders over, with a Power of Revocation, Levied a Fine, and then by a Deed found to be Sealed ten Days after, declared the Uses of the Fine, which Deed had the Circumstances required by the Power. The Question in the Case was, Whether the Fine had extinguished the Power?

It was Argued that it had not, because the Deed and Fine shall be but one Conveyance, and the use of a Fine or Recovery may be declared by a subsequent Deed, in the 9 Co. Downam's Case, And a Case was Cited which was in this Court in my Lord Hale's time, between Garrett and Wilson, where Tenant for Life, with Remainders over, had a Power of Revocation, and by a Deed under his Hand and Seal Covenanted to levy a Fine, and
declared

declared it should be to certain Uses; and afterwards the Fine was Levied accordingly. This was held to be a good execution of the Power, and limitation of the new Uses, and the Deed and Fine taken as one.

On the other side it was Argued, That the Deed was but an Evidence to what Uses the Fine was intended, and the Power was absolutely revoked by the Fine. Suppose he in Remainder had Entered for the Forfeiture before this Deed, should the Defendant have defeated his Right? Et Adjournatur. Postea.

Hodson versus Cooke.

IN an Action upon the Case for commencing of an Action against him in an Inferiour Court, where the Cause of Action did arise out of the Jurisdiction.

After a Verdict for the Plaintiff, upon Not Guilty it was moved in Arrest of Judgment, That it was not set forth that the Defendant did know, that the Place where the Action arose was out of the Jurisdiction, which it would be hard to put the Plaintiff to take notice of.

On the other side it was said, that the party ought to have a Recompence for the Inconvenience he is put to, by being put to Bail perhaps in a Case where Bail is not required above, and such like Disadvantages which are not in a Suit brought here; and the Plaintiff ought at his peril to take notice. However to help by the Verdict.

And of that Opinion were Jeffreys Lord Chief Justice, Holloway and Walcot; but Withens contra.

The Court said, that it could not be assigned for Error in Fact that the Cause arose out of the Jurisdiction, because that is contrary to the Allegation of the Record, neither is the Officer punishable that executes Process in such Action; but an Action lies against the party. And so it was said to be resolved in a Case between Cowper and Cowper, Pasch. 18 Car. 2. in Scac. when my Lord Chief Baron Hale sat there.

Anonymus.

AN Indictment of Perjury for Swearing before a Justice of the Peace, that J. S. was present at a Conventicle, or Meeting for Religious Worship, &c.

It was moved to quash it, because it did not appear to be a Conventicle, (viz.) That there was above the number of Five, and so the Justices of the Peace had no power to take an Oath concerning it, and then it could be no Perjury. To which the Lord Chief Justice said, That Conventicles were unlawful by the Common Law,

Law, and the Justices may punish Unlawful Assemblies. And he seemed to be of Opinion, that a man might be Indicted of Perjury in a voluntary and Extra judicial Oath; and cited a late Case, where one had stole away a mans Daughter, and went before a Justice of the Peace and Swore that he had the Fathers Consent, and this in order to get a Licence to marry her; and he was Indicted, and Convicted thereupon.

And all the Court said, that it was not the course to quash Indictments of Perjury, Nuisance, or the like; but to put the party to plead to them.

Termino Paschæ, Anno 36 Car. II.

In Banco Regis.

Duncomb versus Walter.

In an Indebitar Assumpsit by an Assignee of Commissioners upon the Statute of Bankrupts, upon Non assumpsit a Special Verdict was found, upon which the Case appeared to be thus:

One Staly was Arrested by an Executor of his Creditor, 6 Sept which was before Probat of the Will, and within two or three days after he paid 1000 l. to the Defendant, to whom he stood Indebted in such Sum, and after the 18th of September he yielded himself to Prison upon the said Arrest.

The Question was, Whether the Defendant should be obliged to Refund this Money which was paid unto him, as afore-said?

First, Whether the Arrest before the Probat was a good Arrest? It was said, If an Executor hath a Reversion in a Term upon which a Rent is reserved, and Distraints, &c. he may abate for the Rent before the Probat. Vid. 1 Roll. 917. tit. Executors, where an Executor brings an Action before Probat; yet if he shews the Probat upon the Declaration 'tis well enough.

Secondly, Whether, when he yields himself to Prison, it shall not relate to the first Arrest, to make him a Bankrupt from that time? This depends upon the Statute of 21 Jac. cap. 19. where it is said, that in the Cases of Arrest and lying in Prison, he shall be adjudged a Bankrupt from the time of his first Arrest.

Object.

Object. This Relation doth not prejudice Strangers?

Ans^r. Dame Hales's Case, Pl. Com. 293. If one giveth another a mortal Wound, and then sells his Land, and the person dies; there shall be such Relation as to make the Land forfeit from the first Stroke.

Note; This Case came by Writ of Error out of the Common Pleas, where Judgment was given for Walter; and the said Judgment was affirmed in this Court principally upon the point, of Relation: For the Court said, that it would be a great mischief if it should relate to the first Arrest, as to the payment of Money to Strangers.

Termino Sancti Hillarij, Anno 1 & 2 Jac. II.

In Banco Regis.

Herring *versus* Brown.

Quod vid. ante Michaelmas 35 Car. 2.

THE Case upon a Special Verdict was to this effect; That J. S. being Seised in Fee had made a Conveyance of his Estate to the use of himself for Life, with divers Remainders over to other persons, with a power of Revocation by Writing under his Hand and Seal, &c.

Afterwards the said J. S. having a purpose to Revoke the said Uses, and make a new Settlement of his Estate, he levied a Fine, and after the Fine he made a Deed, wherein he expressed that he Revoked the former Uses, and so proceeded to a new Limitation by that Deed, and declared that the Fine by him limited should be to the Uses of the said Deed.

The sole Question was, Whether the Fine had extinguished his Power, and by consequence forfeited his Estate; or, Whether the Fine and Deed should be taken as one Conveyance, and so be a good execution of his Power, and new limitation of the Uses?

And after many solemn Arguments it was Resolved by the Chief Justice Herbert, Holloway and Wright, that the Fine was an extinguishment of his Power, and that the Deed came too late; contrary to the Opinion of Justice Withens. *Vide* ante.

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Termino

A D D E N D A.

Termino Sanctæ Trinitatis, Anno 26 Car. II.

In Banco Regis.

Pibus *versus* Mitford.

Intratur Trin. 20 Car. 2. Rot. 703.

IN an Ejectment the Jury find a Special Verdict to this effect, (*viz.*) That *Michael Mitford* was seiz'd of the Lands in question, and of divers other Lands in Fee, and having Issue *Robert* by one *Venter*, and *Ralph* by *Jane* his second Wife, did (23 Jan. 21 Jac.) by Indenture Covenant to stand seized of some of the Lands to the use of himself for Life, Remainder to Trustees for years for several purposes, Remainder to *Jane* his second Wife for Life, Remainder to *Ralph* and the Heirs Male of his Body. And as to the Lands in question, he Covenants to stand seized To the use of his Heirs Male begotten, or to be begotten on the Body of his second Wife, and died. And then the Jury made this Special Conclusion, If any Use did arise by the Deed to *Ralph*, then they find for the Defendant; and if not, they find for the Plaintiff.

This Case was Argued several times at the Bar, and now the Judges delivered their Opinions *seriatim*.

Will Justice for the Defendant:

We are to give our Opinions upon a Deed of Uses, made for the Provision of younger Children not otherwise provided for: But if the Case were not so, It is a safe way, when the Words are ambiguous, to follow the Intention of the party appearing in the Deed. I shall not maintain, that *Ralph* is a Purchaser, and so make this an Executory Use: I agree, a man cannot either by Conveyance at Common Law, by Limitation of Uses, or Devise, make his right Heir a Purchaser; I agree also *Grifwold's Case* in *Dyer* 156. and if this Case had operated by Transmutation of Possession, this Limitation to the Heirs of the Body of the Covenantor had been void, and no Use should have risen: But here, in the Case of a Covenant to stand seiz'd, nothing moves out

out of the Covenantor, he retains the Land and directs the Use, and keeps sufficient in him to maintain this Use. There's a great difference between a Conveyance at the Common Law, and a Conveyance to Uses: At the Common Law, the Heir cannot take where the Ancestor could not; but otherwise it is in case of Uses, 2 Rolls 794. and so is Wood's Case, 1 Co. 99. a. cited in Shelly's Case.

This I say, to shew, that the Intent of the Parties shall be the Guide, and that there is a difference between Conveyances at the Common Law, and Conveyances to Uses. Horwood's Opinion in Hussey's Case, 37 H. 8. comes to our Case: There's no great difference between a Covenant to stand seiz'd. and a Feoffment to Uses.

I will not Argue to prove, that this Deed shall enure as an Executory Use, because 'tis against a Rule in Law taken by my Lord Hobart, and so Agreed before his time: But here Ralph is Tenant in Tail, Michael his Father being Tenant for Life, Remainder to his Heirs Male begotten on the Body of Jane his second Wife. For the Law, to preserve this Limitation to the use of his Heirs Male, &c. will by Implication create an Estate for Life in Michael; because the Intent of the parties appears, that it should be so. There's no great difference between the Construction of a Deed of Uses and a Will, 13 H. 7. The Wife takes an Estate for Life by Implication, where the Land is devised to the eldest Son after her decease, Manning and Andrew's Case in 1 Leon. 259. The Reason of these Cases, is the fulfilling of the Intention of the Parties; and here this Limitation cannot be made good by way of a Future Use, nor by any other way, but only by creating of an Estate for Life in Michael the Father by Implication, and this is according to the nature of a Covenant to stand seiz'd: For the Use is not to pass out of the Covenantor till the proper time for the subsequent Estate to commence. As to my Lord Pager's Case, 'twas his Intention to have the Use during his Life. And my Lord Coke was certainly very well satisfied with the Resolution in Fenwick and Mirford's Case, when he wrote his Institutes; for he Argued before to the contrary, as appears by the Report of that Case in Moor.

Rainsford Justice to the same Intent.

If no Use rises immediately to Ralph; yet if a Use rises by the Deed so that he has the Land any way, be it by descent from his Father, 'tis within the Conclusion of the Verdict.

By the scope of the Conveyance it appears, that it was intended, that Robert should never have this Land till Twelve hundred Pound was paid for the provision of younger Children; so that if Robert should have it, it would be against the Intention of Michael.

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There are two Reasons and Grounds in Law, by which we may make this Deed agree with the Intention of the Parties.

First, Because it is in the Case of an Estate Tail, *ubi voluntas donatoris observari debet*.

Secondly, It is in a Conveyance settled by way of Use, and in Cases of Uses the Intention of the parties ought to be pursued; And this is in Case of a Use that rises by Covenant to stand seiz'd, which makes the Case the stronger.

And I conceive this is not a void Limitation, but such an one as gives an Estate to Ralph. In speaking to which I shall observe what my Lord Coke in the 1 Inst. 23. says, viz. That so much of the Use as the Owner of the Land does not dispose of, remains in him, &c. and so in Cownden and Clark's Case in Hob. 30. And this is the Reason of Bingham's Case, 1 Co. 91.

Now here when Michael Covenanted to stand seiz'd to the Use of his Heirs Male on the Body of his second Wife begotten, I conceive he shall retain the Land as parcel of his ancient Use during his Life; for *non est Hæres viventis*, according to Archer's Case, 1 Co. And that Michael shall retain an Estate for Life is prov'd by my Lord Pager's Case, 1 Co. 154. Dyer 310. N. 79. 1 Co. Chudleigh's Case 129. 2 Rolls 788. 21 H. 7. 18.

From my Lord Pager's Case (upon which I shall rely) and the other Cases it appears, that where there's a Limitation to one after the death of another, the Covenantor shall retain the Land during the Life of the other; and here in our Case, this Estate not taking effect till after the Death of Michael, he shall retain the Estate, and shall be Tenant for Life of the old Use.

Now the Question is, Whether Ralph shall take by Descent, or Purchase? And I conceive this Estate for Life, with the Remainder in Tail, makes but one Estate Tail in Michael, and that he becomes Tenant in Tail, and so Ralph shall take as Heir in Tail. I shall not trouble my self, whether Ralph may take here as a Purchaser because in Cownden and Clark's Case in Hob. it is resolved, that he cannot take as Heir Male of the Body by Purchase; because all the words are not verified in him, for he is not Heir.

I shall rely upon the First Point, That here is an Estate Tail executed in Michael. For when an Estate for Life is in the Ancestor by way of Retainer, and an Estate is afterwards limited to his Heirs, this is within the Rule put in Shelley's Case in 1 Co. where the Ancestor takes an Estate of Freehold, and by the same Conveyance an Estate is limited to his Heirs, Mediate or Immediately, they are Words of Limitation, and not of Purchase; because the Heir is part of his father.

And Our

Our Case is stronger than Fenwick and Mitfords Case: Its true, the same Reason for that Case is not given by Anderson and More, which is given by my Lord Coke, More 437. There the Reason is, because the Limitation to the right Heirs is merely void; here Michael hath an Estate in Tail of the ancient Use, therefore 'tis not necessary for the Law to create an Estate for Life.

Obj. That this cannot be an Estate Tail executed in Michael, because the Estate for Life is not by the same Limitation, but by Construction of Law.

But my Lord Coke says in Fenwick and Mitfords Case, 1 Inst. 22. b. that there is no difference where the Estate is created by Law, and where by the Deed. 1 Anderson 259. and the Law retaining an Estate in Michael for Life, our Case is the same, as if the Estate had been limited to him, with the Remainder to his Heirs Male begotten on his second Wife, which would be an Estate Tail executed in Michael, and would have descended to Ralph.

Twifden Justice for the Plaintiff.

I hold there's no Use raised to Ralph by this Deed. We are here in the construction of a Deed, and not of a Will; It may be an Estate should be raised in such a case by a Will, altho' my Lord Hobart is of a contrary Opinion. I agree, the Case of Hodgkinson and Wood, Cro. Car. 23. but it cannot be argued from thence, that it shall be so in a Deed, for a Devise is not to take effect till after the Death of the Devisor, and then 'tis apparent, that he is Heir Male of his Body. It hath been agreed, that Heirs Male of the Body are words of purchase: It is plain, that Ralph cannot take as Special Heir unless by Purchase, and that he cannot do, because he who shall take by virtue of such a Limitation ought to be Heir as well as Issue Male; and Ralph here cannot take by virtue of the Statute de Donis Conditionalibus because none can take as Special Heir, but where his Ancestors took before; and therefore this Limitation is utterly void.

To make this Limitation good, divers ways have been urged.

First, That this Deed has an operation by way of returning of the Use, and it has been compared to my Lord Pagets Case which differs from it; here cannot be any part of the old Use in Michael, for if he hath an Estate for Life, it ought to be a new Use; It cannot be a returning Use, for the Limitation to the Heirs Male of the Body of Jane the second Wife is void, and it cannot be returning where the Use is not settled in any Person. I agree, my Lord Pagets Case, because there the Estate was vested in William Pager, and the other Use returned by operation of Law, and the Estate settled could not be dissolved; but here the Limitation to the Heirs Males being void, the ancient Use remained yet in Michael, for nothing was out of him, he having limited a thing which

which cannot be. And as to a returning Use, tho' all be done in an instant, yet there is a priority of time in the Eye of the Law, so^r it ought to vest first in him in Remainder, and then Return; but here nothing vests in the Remainder.

Secondly, It hath been urged, That it shall be made good by Implication of Law, and so shall amount to a Covenant to stand seized to the Use of the Covenantor so^r Life, &c. and the rather, as it has been said by Wild, because Uses are guided by Equity.

But I answer, we are here in case of a Deed, where an Estate shall not be raised by Implication, as it shall by a Will, Cro. Car. Seagood and Hone 366. A Deed differs greatly from a Will, so^r if a Man Surrenders Copyhold Land to two, equally to be divided, they are Joynt-tenants; but such a Devise would have made them Tenants in Common. Admit in some Cases an Estate shall be raised by Implication in a Deed; yet it shall not be so here, so^r it would be to the disinheriting the Heir: As to the case of 13 H. 7. I agree, that a Devise to the Eldest Son, after the Death of the Wife, gives an Estate so^r Life to the Wife; but otherwise it would be upon such a Devise to the Younger Son, so^r there the Eldest Son, and not the Wife should have the Estate in the meantime, Cro. Jac. Horton and Horton 57. We are not herein Favorabili materia, and therefore no construction shall be made, which does not appear by the words. It hath been strongly urged, that this being by way of Use (which is a matter of Equity) shall be favoured. Admit it; yet it shall be guided by the Common Law, so^r *aequitas sequitur legem*. There never shall be a Settlement by way of Use, to make one capable who is not capable by the Common Law. I do not see any difference between a Feoffment to Uses, and a Covenant to stand seized; so^r if a Feoffment be made to the use of one so^r Life, the Use shall return which is not disposed of, as well as upon a Covenant to stand seized.

Thirdly, It has been urged, if these severally cannot support this Limitation; yet the intention operating with the Deed, will both together make an Estate so^r Life in Michael. But I do not see his intent here to have it so^r Life; the intention even in a Will, which is much stronger, ought to be collected out of the words of the Will. Cro. Car. Spirt and Bence 368. agreed by the whole Court, that words in a Will ought to have an apparent intent to disinherit an Heir, and here there is not any apparent intent, but rather to the contrary; so^r of some Lands Michael Covenants to stand seized to the Use of himself so^r Life, Remainder, &c. but of the Lands in question, he makes a difference in the Limitation: And the words of the Deed are to be considered, He Covenants to stand seized to the Uses, mentioned, declared and limited in the Deed, and if Michael shall have an Estate so^r Life, he must have it

it by operation of Law. There was a like case between Flavil and Ventroise in the Common Pleas, in which the Court was divided; but the same Point came afterwards in question, in the Case of Mr. Tape of Norfolk, and it was adjudged to be the ancient Use: And no Case can be shewn, that the Law will create an Estate in the Covenantor, where the Use is not vested in any Person, but the ancient Use remains in him.

As to the Cases cited on the other Side, I have answered my Lord Pagets's Case already. And as to my Lord Cokes Case, 1 Inst. 22. b. I agree the Use returns, and the Son is in by descent; and so it was adjudged in Fenwick and Mitfords Case there cited: But the Paraphrase he makes there I do not understand; It is said there, when the Limitation is made to his right Heirs, and right Heirs he cannot have during his Life, the Law doth create an Use in him during his Life: Wherefore is this said? to make the Heir in by descent? No doubt without this he is in by descent, and so was the Judgment in that Case; so? what Reason then should there be an Estate for Life raised by the Law, to be merg'd by the Fee as soon as raised?

And there 'tis said, Till the future use come in Esse, I do not conceive then where it is so long as the Father lives, and what he means by the Future Use, I do not know, for it always was in Esse, and never was out of the Feoffor, and this was so adjudg'd in that Case of Fenwick and Mitford, and not the construction of my Lord Coke: And 'tis strange, that no other Reports should mention his construction.

Hale Chief Justice for the Defendant.

If Ralph takes either by Descent from Michael, or by Purchase, the one way or the other answers the Verdict, and the Issue is for the Defendant.

I shall divide the Case into two Points.

1. If he takes by Descent?

2. Admitting he does not, If he may take by Purchase, as this Case is I shall premise two or three things.

First, It has been agreed, if an Estate for Life be raised to Michael, the Remainder being to his Heirs Male, of the Body of Jane his second Wife, the Estate Tail is executed in him; be the Estate for Life raised by Implication, or express Limitation.

Secondly, It is plain quacunque via it be rais'd, that the Estate was lodg'd in Michael, till Ralph the Son be in a capacity to take it, either by Descent or Purchase; for be it part of the ancient Use, or a new Use, it ought to be in Michael during his Life, for there is nothing to bring it out of him.

Thirdly,

Thirdly, In all Cases touching Uses, there is a great difference between a Feoffment to Uses, a Covenant to stand seized, and a conveyance at the Common Law. If a Man by Feoffment to uses conveys Land to the use of J.S. for Life; he may remit the Use to himself, and the Heirs Male of his Body by the same Deed, and so alter that which was before a Fee simple, and turn it into another Estate; but if A. gives Land to B. for Life, Remainder to A. and the Heirs Male of his Body; because a Man cannot give to himself, the Remainder is void, for a Man cannot convey to himself by a Conveyance at the Common Law.

These things being premised, I conceive here is an Estate Tail in Michael.

First, Because in this Case the Use returns by operation of Law, and executes an Estate in Michael for Life, which being conjoined to the Estate limited to the Heirs Male of his Body, makes an Estate Tail: This Estate for Life rising by operation of Law, is as strong as if it had been limited to him for his Life, and after his decease to the Heirs Male of his Body.

Secondly, Because that a Limitation to the Heirs Male of his Body is in Construction of Law, a Limitation to himself and the Heirs Male of his Body. There is a great difference, when he who has the Use, limits it to A. for Life, the Remainder to the Heirs of the Body of B. here no Estate can rise to B. because nothing moved from him, but where he who has the Estate limits it to the Heirs Male of his own Body, ut res valeat, he shall have it for his Life.

Thirdly, It is plainly according to the intent of the Parties; the intent perfectly appears, that the Issue by the second Wife should take, and that Robert the eldest Son should not take till so much Money be paid; therefore, if we can by any means serve the intent of the parties, we ought to do it as good Expositors. For as my Lord Hobart says, Judges in Construction of Deeds do no harm, if they are astute in serving the intent of the Parties without violating any Law.

Obj. Here the Use being never out of Michael, he hath the ancient Use which is the *Fee simple*, and consequently being the ancient Use, and this being a new Limitation to the Heirs Male of his Body, the ancient use and the new one cannot be piec'd, to make an Estate Tail executed in Michael, but it shall be a Contingent Use (if any) which ought to rise to the Heir Male of his Body, and so remains the ancient *Fee simple*. And it hath been compared to these Cases. If a Man Covenants to stand seized to the Use of J.S. or of his Son after his Marriage, or after the Death of J. D. these are Contingent Limitations, and there is a *Fee simple* determinable in the Covenantor to serve the future Uses.

Resp.

Resp. 'Tis true, if a Man Covenants to stand seized to such Uses, as that he leaves a descendible Estate in himself: As if a Man Covenants to stand seized to the Use of his Son, from and after his Marriage, this is purely a Contingent Use, because tis possible the Marriage may never take effect, and nothing is fetch'd out of the Covenantor; so if he Covenants to stand seized to the Use of J. S. after 40 years, there is a Fee simple determinable in the Covenantor, and therefore those Cases are not to be resembled to our Case, where the Estate of Michael cannot continue longer than his Life. And this without any wrong done to any Rule of Law, may be turned to a Use for Life, and therefore such construction shall be.

Object. 2. Here is an Estate to rise by way of Use by a Deed, and not by a Will, which shall not be by Implication by a Deed.

Resp. Its a certain truth: But we are not here upon raising an Estate by Implication, but qualifying an Estate that is now in the Father, which by this new Deed is to be qualified to be an Estate for Life, to preserve the Estate Tail; so that the Cases of Implication are not to the purpose.

Object. 3. In this Case Michael shall be in of his ancient Estate in Fee simple which is in him, and not of a new Estate created by Implication of Law; and it hath been compared to the Devise of Land to a Mans Heir, he shall not be in by the Devise, but of his ancient Estate, that would have descended to him.

Resp. True: But in this Case a Man may qualifie his Estate, as in Gilpins Case, Cro. Car. 161. Devise to his Heir, upon Condition, that he shall pay his Debts in a year; the Heir is a Purchaser; so here is a qualification to turn the Estate of Michael into an Estate for Life, ut res valet.

Object. 4. Michael had not an Intention to have an Estate for Life, for in the Limitation of the other Lands, he has limited them expressly to himself for Life, and if he had intended to have had an Estate for Life in the Lands in question, he would also have so expressed it.

Resp. The Intention will not controul the operation of Law; his main Intent was to settle the Lands upon his younger Children, this the Law serves, but not his secondary intentions; If a Man Covenants to stand seized to the Use of himself for Life, without impeachment of Waste, and afterwards to the Use of the Heirs Male of his Body, the Law supervenes his intention, and makes him to be Tenant in Tail. And in our Case there was a necessity to limit the other Lands to himself for Life, because there was another Estate to intervene the Estate for Life, and the Estate Tail. The Reason given by my Lord Coke, in Fenwick and Mifords Case is plain enough, and it appears that he was of that Opinion afterwards by the Report of Pannel and

Lanes Case, 13 Jac. in Rolls Rep. 1 part. 238. The Case upon which I shall rely, which has not been answered, is my Lord Pagets Case; adjudged by all the Judges of England.

Tho. Lord Paget Covenants in consideration of the discharge of his funerals, Payment of his Debts and Legacies out of the profits of his Land, and for the advancement of his Son, Brother and others of his Blood; that he and his Heirs would stand seized of Divers Mannors to the Use of T.F. one of the Covenantes, for the Life of my Lord Paget, and after his Death to the Use of C. Paget, for the term of 24 years, and then to the Use of W. Paget his Son in Tail, with Remainders in over; and afterwards the Lord Paget was attainted of Treason. And it was adjudged, that the Lord Paget himself had an Estate for his Life, for the Remainder being limited after his Death, the Estate cannot pass out of him during his Life; and there in Case of a Covenant to stand seized, he himself hath an Estate for Life: And this is not because the Estate returns as my Brother Twisden has said, but because the Estate was never out of him, and cannot return either from the Heir of the Covenantee; otherwise, where should it be during the Life of the Lord Paget, who was attainted? the Book is, that it was never out of him, but was turn'd into an Estate for Life; So that now it is all one, as if he had Covenanted to stand seized to the Use of his eldest Son after his Death. And the question is, What Estate he has during his Life; It is adjudged, that he has an Estate for Life, for if there had been a Contingent Fee simple in the Lord Paget, his Heir could never have had an Amoveas manus; for if a Man Covenants to stand seized to a Contingent Use, and afterwards is attainted of Treason before the Contingency happen, the Contingency shall never rise, for the King has the Estate discharged, and the Use is to rise out of the Estate of the Covenantor; so is Moor, Sir Tho Palmers Case 815, In Moors Rep. of my Lord Pagets Case, 194. Its said, that W. Paget had an Amoveas manus for the Estate of the Queen leased by the Death of my Lord Paget. In Sir Francis Englefelds Case, Popham 18. n. 7. Its resolved, that no Use rises, because tis, that it shall Descend, Remain or Come which is uncertain; but if he had Covenanted, that after his Death he and his Heirs, would have stood seized to the Use of John, an Use would have resulted to Sir Francis.

Second Point. I conceive if it be impossible for *Ralph* to take by Discent; this would be a Contingent Use in him by Purchase.

The great Objection against this is, that the Limitation is to an Heir, and an Heir which ought to take by Purchase; ought not to be only Heir of the Body, &c. but Heir general. Of this I am not well satisfied: I conceive the Remainder being limited to the Heirs of the Body of Jane, begotten by Michael, such a Limitation will make a special Heir to serve the turn, and tis not to be resembled to Shelley's Case. My Reasons are,

First, Because at the Common Law, before the Statute de Donis notice was taken, that this was a special Heir, and therefore 'tis no wrong done to make him here a qualified Heir. In the Statute de Donis 'tis said, When Lands are given to a Man and his Wife, and the Heirs of their two Bodies begotten.

Secondly, Upon the special penning of the Deed it is apparent, that Michael took notice, that he had an Heir at Common Law: therefore it can't be intended, that he meant here such an Heir that should be Heir general to him; this would be Contradictio in Adjecto. Litt. Sect. 352. puts this Case. If a Feoffment be made upon Condition, that the Feoffee shall give the Land to the Feoffor and his Wife, and the Heirs of their two Bodies begotten; In this Case, if the Husband dye, leaving his Wife, before the Estate Tail is granted to them, the Feoffee ought to make the Estate as near the Condition, and as near the intent of the Condition as may be, (*viz.*) To let the Land to the Wife for her Life, without impeachment of Waste, the Remainder to the Heirs of the Body of her Husband on her begotten; If the Husband and Wife dye before the Gift made, then the Feoffee ought to make it to the Issue, and to the Heirs of the Body of his Father and Mother begotten. Suppose that this had been to a second Wife, and there had been Issue by a former; the Book of 12 H. 4. 3. says that there it shall be in another manner; but Litt. says it shall be as near, *vid.* Litt. Sect. 22. Morevils Case, Fitzh. Tail 23. 2 Ed. 3. 1. 4. Ed. 3. 50. by all these Cases it appears, that no regard is had, whether the Son be Heir of the Husband, if he be Heir of their two Bodies. Therefore it seems, that by this Limitation Ralph shall take by way of Contingent Remainder: For Heirs of the Body of the second Wife is a good name of Purchase. I have not read any Case against this. Hill. 16. or 26 Eliz. there was this Case. A Man taking notice in his Will, that his Brother (who was dead) had a Son, and that he himself had three Daughters who were his right and immediate Heirs, he gave them 2000 l. and gave his Land

to the Son of his Brother, by the name of his Heir Male. Provided, If his Daughters troubled his Heir, then the Devise of the 1000 l. to them should be void. And it was resolved, that the Devisor taking notice, that others were his Heirs, the Limitation to his Brothers Son by the name of Heir Male was a good name of Purchase; and this agrees with Cowden and Clarks Case, in Hob.

Wild Justice said, he was of the same Opinion with Hale in this last Point. And Judgment was given for the Defendant.

Three Learned

ARGUMENTS.

One in the

Court of Kings-Bench,

B Y

Sir *FRANCIS NORTH*, Attorney General ;

And Two in the

Court of Exchequer.

B Y

Sir *MATTHEW HALE*, Chief Baron there.

The Argument of Sir *Francis North*.

In Banco Regis.

Potter and Sir Henry North.

In a Replevin for taking of an Horse in a certain place called the Fenn, at Mildenhall in the County of Suffolk ; the Defendant makes Cognizance, as Bayliff to Sir Henry North, and saith, That the place Where, &c. containeth Ten thousand Acres of Pasture in Mildenhall, whereof a certain place called Delfe is parcel ; and that it is Sir Henry North's Freehold, and the Horse was Damage feasant there, &c.

The

The Plaintiff Replies, Confessing the *Soyl* to be the Freehold of Sir Henry Norths; but says, That time whereof, &c. the place Where hath been parcel of the Fenn, and parcel of the Mannor of Mildenhall, of which Sir Henry North is seised in fee; and that the Plaintiff was at the time, &c. seised of an Ancient Messuage, (one of the Freeholds,) holden of the Mannor, by Rents and Services, and parcel of the said Mannor; and that Time out of Mind there were divers ancient Freehold Messuages, holden of the said Mannor by Rents and Services, and divers Copyhold Messuages, parcel of the said Mannor, by Custom of the said Mannor, demised and demisable by Copy of Court Rolls of the said Mannor.

And the several Tenants of the said Freehold Tenements being seised in their Demesne, as of fee; and they whose Estate they have in the same, Time out of mind have had, together with the Customary Tenants of the said Customary Tenements, the sole and several Feeding of 100 Acres of Pasture for all Beasts, except Hogs, Sheep and Northern Steers, levant and couchant upon their several Freeholds every year, at all times of the year, as to their several Freeholds belonging.

And that within the said Mannor there is, and Temps d'ont, &c. hath been such a Custom, that the several Tenants of the Customary Messuages, together with the Freeholders aforesaid, have used and accustomed to have the sole and several Feeding of the said 100 Acres of Pasture for all their Beasts, except Sheep, Hogs, and Northern Steers, levant and couchant upon their several Copyholds every year, at all times in the year, *tanquam ad sepeal' Tenementa customar' spectant' & pertinent'*; and the Plaintiff being seised put in his Horse, &c. and so Justifies.

Upon this the Defendant demurs generally.

This Prescription is naught in substance, and Judgment ought to be given for the Defendant, upon these four Exceptions:

First, That several Freeholders cannot joyn, or be joyned in a Prescription to claim an entire Interest in another mans *Soyl*, as annexed to their several Estates.

Secondly, The Interest of *sola & sepealis Pastura*, is an entire Interest, and cannot be claimed both by Prescription and Custom.

Thirdly, That the Owner of the *Soyl* cannot be wholly excluded out of the *Soyl* at all times, as this Prescription and Custom import.

Fourthly, This is a new Invention in Pleading, framed to overthrow a Maxim in Law, and is of mischievous Consequence.

Tho'

Tho' but one man pleads, yet 'tis a Joynt Prescription that he Justifies by, and he involves all their Estates in his Prescription, and prescribes for the whole thing belonging to all their Estates; so that 't is the same thing in substance, as if they had joyned in Pleading.

If he had pleaded, That he, together with all the Freeholders and Copyholders, &c. he had prescribed alone, and only for himself; but that would have been naught, because the sole Pasture cannot by any Title of Prescription be annexed to their several Estates, as shall be shewn afterwards.

First, I shall consider the Nature of the thing.

Secondly, The Rules of Prescription.

Thirdly, Examine the Case by those Rules.

First, I admit that there is a sole and several Pasture, and that it lies in Prescription. Cases are frequent, where one man hath the first Crop and the Soyl, and another man hath the Pasturage or sole Feeding till the Sowing again, &c.

I conceive it to be in its Nature a certain and determinate Interest or Profit; I mean in distinction to an uncertain Profit a prender.

To have Common or Pasturage for Beasts levant and couchant upon such Land, or to have Estovers to be spent in such an House, without any determinate quantity or number, I call uncertain; for it is to be measured only by Use and Occasions.

But to have Pasture or Common for 100 Sheep, or Estovers of a certain quantity, as ten Load of Wood, is certain every year, and differs very much in its Nature from an uncertain profit a prender.

As for Example: The Levancy and Couchancy is not traversable, nor the employment of Estovers certain; because that no Surcharge can be to the Owner, Yelv. 188, 189.

It may be granted from the Land a que, 2 Cro. 15. Drury and Kent; for the same Reason, in case of sole Pasturage, the party that claims it having a general Interest, and the Owner being wholly excluded, it is not material with what Cattel it be taken tho' they prescribe with an Exception of some; for if there be an Overplus the Owner cannot have it.

Now as there may be such an Interest, so I admit that several persons may have it; but it must be as Joyntenants or Tenants in Common, where they have several Rights by Moieties and Parts: But several men cannot claim the Entierty of this profit by Prescription, as I shall after shew. If such a Profit a prender as this be annexed to Land, 'tis appurtenant by Prescription or Grant, and if part of the Land a que, &c. is aliened, the Entierty cannot belong to both their Estates, but there shall be an apportionment, (scilicet) the Aliance shall have the same proportion for the

the sole Pasturage, that he has of the Land a que, &c. in the same manner as it would be in a Case of Common appurtenant certain, for which there will be an apportionment in such cases, as was Adjudged 7 Jac. inter Moreton & Woods, 1 Rolls 235.

Having said this concerning the Nature of the Interest demanded, I will now speak concerning the Nature and Rules of Prescription.

A Prescription that is to claim a real Interest of Profit in solo alieno, is a Title, and as a Title must be strictly and curiously pleaded, and is not like Prescriptions that are by way of Discharge, and for Easements, or for Matters of personal Exemption or Privilege.

A man may lay a Prescription in a great many, where it tends but to claim an Easement or Discharge, and not Matter of Interest and Profit, 15 E. 4. 29. 18 E. 4. 3. to say, That all the Inhabitants have had such an Easement, &c. or, to have been Discharged, &c. will be well: And for Matters of Privileges a Prescription may be in General; for it is but a Matter of Exemption, and Personal, and is called a Prescription in distinction to a Custom; because Custom is merely local, and this is to persons, yet having respect to such a place, as All the Citizens, &c. as in Day and Savage's Case in Hob. Rep. Or having respect to such a Condition, as All Serjeants at Law, or All Attorneys of such a Court, such Prescription must be in generality, to express the extent and nature of the Privilege, and so always have been allowed.

But a Prescription to claim a Profit, or an Interest, in alieno solo is a Title; and as in setting forth Titles the Law is curious in pleading, and lays down strict Rules, which must be observed; so in pleading such Prescriptions, the Rules taught in our Books, and the Course of Pleading hitherto used must be followed.

One Rule of such Prescriptions is, That the Thing prescribed for by a *que Estate* (not in gross, but appendant or appurtenant) must agree in the Nature and Quality of the thing to which it is annexed or appurtenant. Corporeal things cannot be appurtenant to Corporeal, because they are distinct, and can have no relation one to another. Estovers of Wood cannot be appurtenant to Land, because they cannot be used for it, 1 Inst. 121. b. 122. a. If a man would plead, That he and all those whose Estate, &c. in Black Acre, &c. Time out of mind, have had Ten Load every year, to be taken, &c. *tantum spectant*, &c. upon Demurrer this would be naught; because it does not agree with the Rules of Law. And Usage may be objected in that case; but Usage alone makes but a Title in gross, which will serve when it has Time out of mind continued in the same Hereditary line.

Usage

Uſage cannot annex a Thing that cannot in nature be uſed with the Thing to which it ſhould be annexed.

One other Rule of Preſcription for Matters of Intereſt, is; That nothing can be preſcribed for, that cannot at this day be raiſed by Grant.

For the Law allows Preſcriptions, but in ſupply of the loſs of a Grant. Ancient Grants happen to be loſt many times, and it would be hard that no Title could be made to things that lye in Grant, but by ſhewing of a Grant: Therefore upon Uſage temp. &om. &c. the Law preſumes a Grant and a Lawful beginning, and allows ſuch Uſage for a good Title; but ſtill it is but in ſupply of the loſs of a Grant: And therefore for ſuch things as can have no Lawful beginning, nor be Created at this day by any manner of Grant, or Reſervation, or Deed that can be ſuppoſed, no Preſcription is good, 11 H. 7. 13, 14. 13 H. 7. 16. per Keble, 21 H. 7. 40.

Preſcription for a Lord to have ſo much for every Pound breach, is a good Preſcription to bind the Tenants, but naught as to Strangers; becauſe as to the Tenants it might have a good beginning by way of Reſervation, but as to a Stranger it could have no Lawful beginning by way of Grant, or Reſervation; or any way that can be imagined.

Now if we examine the Preſcription in the Caſe in Queſtion, by theſe Rules we ſhall find;

First, That the Thing preſcribed for does not agree in the nature and quality nor is applicable to the Thing to which it is annexed.

The Thing preſcribed for is an entire, determinate Intereſt; and the Thing to which it is annexed is ſeveral Eſtates that have no relation one to another; the Uſage of one can have no relation to the Uſage of another.

I would put this Caſe. In an Action of Treſpaſs, the Defendant Juſtifies for Eſtovers certain, or Paſture certain in this Mannor, and that he is ſeiſed of a Meſſuage, &c. in fee, and that J. S. is ſeiſed of another Meſſuage, &c. in fee, and that he and J. S. and all they whoſe Eſtates they have in the ſaid two Meſſuages, have had ten Load of Wood, &c. or Feeding for 500 Beaſts: Or, ſe two Lords of ſeveral Mannors in fee joyn in preſcribing for a certain Rent, under ſavour it were abſurd and never was known or allowed: for the Things to which, &c. being ſeveral, the Uſage of neceſſity muſt be ſeveral, and the Preſcriptions alſo muſt be ſeveral: As for Example, for one of them to preſcribe for a Moiety, &c.

The Reaſon why a man cannot preſcribe to have Eſtovers of Wood to Land is, becauſe there can be no Uſage to annex it; for it cannot be uſed with it; and in all Caſes Preſcription follows

the nature of the Usage; and therefore in the Case at Bar, the Usage being several, and the Estates several, the Prescription ought to be several also.

It is impossible to raise such an Interest by a Grant at this day; for if such a Grant were now made, either the Grantees would be Joyn tenants of this Interest, and then there would be a Survivorship, or else they would be Tenants in Common of it, and their several Interests might be annexed to their several Estates by Purparties or Appportionment: And so it would be in the nature of several Grants; and there must be to several Prescriptions several Men that have had Land time out of mind, yet cannot joyn in making Title, but must make it severally. As for Example:

If there be Three, one of them must say, That his Father was seised of a Third part that descended to him, and so make a Title against a Stranger, tho' there be a joyn't Possession: And if he be to make a Title against his Companions, he may say, That he and all those whose Estates they have in the other Two parts; they cannot say, That their three Fathers were seised of the Lands, and shew the several Descents; no, That they Two, and all whose Estates they have in Two parts in Three to be divided, have held in Common.

For the Title of the one concerns not the other; they are upon Lines and Descents; and Prescription is making of a Title, as was said before; and the Law is as strict in it, or rather more strict, than in making of a Title to Land.

Therefore several Men that have several Estates, and no Relation one to another, cannot joyn in making a Prescription; for the Prescription of one does not concern the other.

Rastal's Entries 622. d. *en Trespass*, &c. Two Commoners, (to avoid prolixity and repetition) do, as near as they can, joyn in a Prescription; but being considered, it is a several Prescription, as much as if they had Justified severally.

By Lord Coke's Rule *on Litterer* 197. a. That Tenants in Common may joyn in an Assize for an entire thing, as an Hawk, or an Horse for the necessity of the case. It may be objected, that there is the same necessity here, I Answer.

That tho' in that case they joyn in the Demand and the Action, yet they must make their Titles severally as they are, they must sue as they may Recover, which cannot be half an Hawk, or half an Horse; but when they come to make their Titles in Pleading, they must set them forth distinct; there the possession is joyn't and cannot be severed; but in our case the possessions are several, and one hath nothing to do with the other, and the thing claimed is in its nature severable, either by Moieties, Purparties or Appportionment.

It may be Objected against my Rule, That a Prescription must be, as a Grant may at this day be made, that (11 H.7.13.14.) a man may prescribe against a great many as Tenants, or a Commonalty, without naming a party certain; and such a Prescription cannot spring out of one Grant no more than this. For if a great many may joyn in one Grant, yet it is so many several Grants as to their several Interests; and so it may be said, there ought to be so many several Prescriptions.

I Answer, The Rules are not alike: for if 100 Men, being a Generality (as all the Tenants of the Manors of Dale) make the same kind of Grant to J.S. or there be the same kind of Reservation, and the thing claimed be annexable to the Estate of J.S. these all unite in the Grantee and his Estate, and the Estate continues entire, Time knits and unites it, and an entire Prescription will serve, being it will serve the Case.

But when a Grant is made from one to many that have several Estates, their Estates are carried and descended several ways, and Time and Usage makes them distinct and several, and cannot be served by the same Prescription.

But the Prescription at Bar is worse upon my Second Reason; for Prescription and Custom are of contrary Natures and incompatible, and cannot give being to the same thing.

Prescription is a Title presuming a Grant to the Freeholders and a Lawful beginning. The Copyholders claim by Custom, because they are but Tenants at Will and not capable of a Grant; their title must be raised from the Lord by parcels, which being an Entire thing it cannot be: for whichsoever should be raised first, the rest must be left in the Lord, who cannot have a Right of sole Pasturage in his own Soil distinct from the Soil.

It may be Objected here, That Custom and Prescription are not of such contrary Natures as I make them; for in *Day and Savage's Case* in *Hob.* 85. the Pleadings were as a Custom of the City, and the Court Adjudged it to be a *Prescription*; which shews, that *Custom* and *Prescription* differ not so much in the nature of the Thing, as in the manner of the Pleading.

For Answer, I need but observe the Nature of that Case. The Officers of the City of London Justified for a Duty of Wharfage claimed by the City. The Plaintiff sets forth in his Replication, That within the City there is a Custom for all Freemen to be Discharged, &c. and the Question was, Whether this was a Custom to be tryed by the Mouth of the Recorder, or a Prescription to be tried *per Pais*? It was held to be in its Nature, a Prescription; and if it were not, that it was Adjudged that it ought not to be tryed by their Certificate who were concerned in Interest.

The Prescription there meant by the Court, was not a Prescription to claim a real Interest, as in this Case; but it was (as I may call it) a local Prescription to privilege Persons in a certain Place and Condition, which is in its Nature betwixt a Prescription and a Custom; and not a Custom, because it concerns the Discharge of persons. And it is not merely Local, nor a Prescription; because it is not annexed to any Estate nor to any Person; but in relation to a certain Place and Condition. And yet it is rather termed a Prescription; for it is said, That Inhabitants may prescribe for an Easement or a Discharge; but a strict Prescription to make Title to a Real Interest is so nice, that it cannot be pleaded by way of Custom, nor confounded with it. Inhabitants, or Freemen, or Citizens cannot prescribe in that kind.

I must add to strengthen my Reasons upon these two Matters, that no President can be shewn in all our Books of any such Case, either where two Freeholders joyn to claim a Real Interest in solo alieno, or where Prescription and Custom are mixed, as in this Case.

It will be no Objection that it cannot be pleaded better when it appears the very thing cannot consist with the Principles of Law; for tho' there be such a thing as several Pasture, and frequent, which may be appurtenant to a Messuage, yet it cannot be annexed to the Estates of so many several Freeholders and Copyholders: But if the thing were consistent with Principles of Law, the Pleading here is naught to mix a Prescription and a Custom together, which are incompatible.

The whole ought to have been laid by way of Custom, it being an Entire thing, and the necessity of the Case would have maintained it.

If J. makes a Feoffment to the use of the Feoffee and Feoffor and their Heirs, one cannot be in by the Common Law and another by the Statute of Uses; but both shall be in by the Statute of Uses. So here, the Entire thing not being to be maintained, possibly both Prescription and Custom should have been laid by way of Custom; for the Freeholders in case of Necessity (it may be) might claim by Custom, tho' the Copyholders could not prescribe.

Thirdly, My third Reason is, because the Owner of the Soil can by no Prescription or Custom be excluded out of his own Soil at all times of the year. And this Reason I principally depend on, because it strikes at the very Root and Essence of the thing.

I know there are many Cases in our Books of Usages, that have been allowed in restraint of the Owner of the Soil; I shall not oppose any one of them, but admit them all; yet oppose this Prescription;

Prescription of which I may confidently say, there is not one Pre-
sident in all our Books.

I will admit the Lord or Owner may be excluded for a certain
time, according to the Books, Fitzh. tit. Prescription 51. Huttons
Rep. 45. Pitt and Cheekes Case, and the same Case 6 Co. by the name
of Sparks Case, and Co. on Litt. 122. a. where he says, a Man
may prescribe to have solam vesturam, from such a day to such
a day, and thereby the Owner of the Soil may be excluded from
Feeding there, so he may prescribe to have Separat' pasturam, and
exclude the Owner of the Soil from Feeding there.

I know that they object, that my Lord Co. is to be understood
as to Separat' pastur', that it may be at all times in the year, be-
cause he does not restrain it as he does the solam pasturam. But
certainly the Law is the same for the one as for the other, and
the Books must be intended for the one as well as for the
other, for coming immediately next, there needed no Repetition
for the latter. but the (so) signifies in the same manner, and so
understood I admit it.

I admit the Lord or Owner may be stinted as to his kind of
Cattel; and have none but Sheep or Horses, and so he may be
stinted to a certain number, according to Kenwick and Pargiters
Case. Yel. 129. 2 Cro. 208.

I admit the Lord or Owner may be excluded as to some kind
of profits: An other Man may prescribe to have omnes Spinās up-
on such a Wast, according to Dowdalls and Kendals Case, Yel. 187.
2 Cro. 256.

And for this Reason, a Man may prescribe to have solam pisca-
riam upon anothers Soil, so there he leaves the Owner the pro-
fits of the Soil for Mawring of his Ground or Ballastage,
which the Owner has besides the Property and the use of
the Water, so that he leaves enough for the subsistence of the
Fish.

Now, I shall agree further, that the Lord may be excluded wholly
from the feeding of his Ground, upon Special Matter shewn to the
Court, whereby it may appear that the Lord has some recompence,
or takes the profits some other way; as if there be a Park or For-
rest where the Lord has the Game, an other Man may prescribe
to have the Herbage, for the Lord has considerable profits of the
Ground by his Deer, which is so considerable, that if the fran-
chise come to be determined, it hath been held that such a Pre-
scription for Herbage being but surplusage after the feeding of the
Deer and subordinate to it, shall rather be lost than carry the
whole profit of the feeding and exclude the Owner. And it has been
the Case of many Parks, that have been disparked by the King, after
the Herbage granted away; so if there be Mines opened, or any
other profit, that appears to the Court to be left to the Owner.

I do not oppose, but that the pasturage may be claimed by prescription.

But to have the Sole pasturage of all Pasture Grounds at all times in the year, is to have the whole profit of the Ground, and the Owner is wholly excluded, which would be very unreasonable. I shall agree yet further, that upon a Special Case shewn to the Court in the Pleading, the Lord may be excluded from any permanency of profit in his own Soil, as putting this Case; a Lord hath improved so much of his Wastes as that he has left, but just sufficient for his Common Feeding in such Case the Lord ought to be excluded of Feeding; but this must be shewn in Pleading, according to my Lord Coke's Opinion, in Kenwick and Pargiters Case, which is well reported in Brownlow 2 part 64, 65. And in all reason there must be Special Pleading in such Case, for where a Prescription or Custom is reasonable only upon Special Matter or Circumstance, that Special Matter or Circumstance must be shewn to the Court, by him that would have the advantage of the Prescription, for the Negative cannot be averred on the other side.

And it cannot be helped, by supposing there may be Trees, Mines or Park, but it ought to be shewn; for every thing that depends upon supposition, may as well not be as be, and to allow a Prescription upon such a supposal, would be to bind up a party by it tho' the thing be not; and Pasturage may well be supposed, the whole profit of Pasture Ground, for it is so in fact in many places, and has its name, because it is fed all the year. But where it is fed but part of the year, and mowed or plowed the rest, it is called Arable or Meadow.

The main Objection that I conceive they can make to this is, That the Sole Pasturage or Vesture lies in Grant, and the Owner may exclude himself wholly by Grant, and so he may be excluded by Prescription or Custom; and this they ground upon Co. Litt. 4, b. where it is said, if a Man Grants to another, and his Heirs vesturam terræ, and makes Libery secundum formam Chartæ; yet the Freehold of the Soil shall not pass; by which it is implied, that the Vesture shall.

If this Book be to be understood of the Vesture at all times of the year, where no other profits remain to the Lord, I shall crave leave to object against it from the same Page, where it is agreed, that if it were profits, the Soil would pass.

Yet thinks it should be the same in reason, where the Vesture is all the profits, and Vesture shall be intended all the profits. I shall cite some Authorities, which are not inconsiderable to Warrant this Opinion.

I have in a Manuscript Report of Cases in King James's time, a Case betwixt Collins and the Bishop of Oxford; It was Paschæ 19. Jacobi upon a Tryal at Bar in the Kings Bench. The Case was, that 1 Ed. 6. the King erected the Bishoprick of Oxford, and gave to the Bishop and his Successors, int' al' primam vesturam of a Meadow called Horse Meadow. John Bridge Bishop of Oxford leased it for three Lives, rendering Rent, and dies; his Successors before restitution of the Temporalities accepted the Rent of the Lessee, and afterwards entered upon him. Upon this Case the first question was, what passed by the Grant of prima vestura.

My Report says, That it was agreed by all the Justices, that by a Grant of Vestura Terræ by a common Person the Soil will pass, and then there must be a Livery of consequence; but they held a Grant of prima vestura, was but like a Grant of prima consuetudo, and being for no certain time, is but an Interest in the first cutting, or taking of the Grass. But they all agreed, that if a Man Grants primam vesturam, from such a day to such a day certain, the Grantee shall have the Soil and Mow it, or feed it as he pleases.

Kelway 118. If a Man Grants vesturam Terræ for term of Life to another, it is a Grant of the Land for Life; for saith the Book, the vesture is the profit of the Land, and it is all one to have the profit as to have the Land it self. Littleton puts the Case, if a Man Grants the Vesture of Land to another and his Heirs, without Livery, no Estate passeth.

But the Book of my Lord Cokes differenceth, betwixt the Vesture of the Land, and the profits of the Land seems to be mistaken, and in reason they are the same; for I take it generally speaking Vesture shall be intended all the profits; and if there be special profits, as Mines opened, or Waters, &c. which may qualifie the word, and retain the Soil to the Owner; it must be so.

And as it is for Vesture of Land, so I conceive where it appears in pleading that the Ground is Pasture. Pasturage or Sole Feeding will signifie all the profits; for Pasture is properly that which is wholly for Feeding; and where the Sole Pasture is claimed, the Owner cannot claim, or take any other profit.

Temps E. 1. tit. Partition 11. Two Men agree to make partition of Pasture Ground in this manner; That one shall have totam pasturam, from such a time to such a time; and the other for the residue of the year; this is a partition of the Soil it self, which shews Pasture is to be intended the whole profits of Pasture Ground; in that case the quo jure could not be maintained; for the party had not barely a Liberty; but the Soil it self.

If severat Men have Profits upon the same Land, alternis vicibus, the Law most commonly determines the right of the Soil to be in him, that has the most considerable Profits. As for Example.

If one has the Summer Feeding of Pasture, or the first Tonsure of Meadow, or the Sowing and Reaping of Corn upon Arable, and another Man has the Feeding separately at other times of the year; the Law saith, that the Soil is in him that has the Summer profits and Corn, because it is the greater Profits, and the other hath but a Profit a prender.

Now, suppose that two Men have interchangeably the sole Feeding of Pasture at such times, that the interest of one is in all respects equal to that of the other, there nothing can determine the Soil to be in one more than the other; and therefore it shall be in one for his time, and in the other for his time. But where one has the sole feeding of Pasture at all times in the year, and it has been so time out of mind, and there is nothing but Pasture, what can the other have to shew the Soil to be in him, and why should it not be said to be in him that has the feeding of whole Profits? It seems very absurd, that a Man should be allowed to be Owner of the Soil, and yet it may be has no badge of Ownership by Perception of Profits. If the Mans Estate be displaced so as to be put to a Weir of Right, how would he lay the Esplees?

And as to this Consideration there may be difference between a Grant and usage, for a Grant beginning within time of Memory, the Ownership of the Soil was once fully manifested, until he had divested himself of all but that; but upon usage time out of mind nothing can be said, why one Man should have the Soil more than another if it be not in him that hath all the Profits.

I must end this Point also with this Observation, That if there is no Case in all the Books of a Sole Pasture at all times of the year, but in F. N. tit. Prescription 51 and 55, and Hutton 45. It is made a Profit a prender, and the most considerable Profits are left to the Owner.

My fourth Reason upon which I hold this Prescription is void, is, because it is a new invention framed to overthrow a Maxim in Law, and is of mischievous consequence.

New inventions that are agreeable to Rules of Law, I know have been always received, and sometimes have proved of excellent use. But New inventions that are framed to supplant Principles of Law, have been always baffled and rejected.

The Maxim and Principle of Law that is overturned by this way of Pleading is, That a Commoner cannot prescribe to exclude his Lord.

This

If so, what if all but one fail, shall that one have all?

If on the contrary, the Lord shall feed, must he do it as the Owner of the Soil, and have the Surplusage? for the Levancy and Couchancy, is not material among themselves. And then they would become as Commoners again; and this would be a strange Prescription, that cannot be maintained if ever there were any Escheat of any Tenancy into the Lords hands.

4. But the greatest mischief of all will be, that this will be a ready way to enable Tenants to withstand all Improvements. In Gatewards Case, 6 Co. 60. it was a great reason against a Prescription, that it was inconsistent with any improvement; it would be a great mischief to this Kingdom where there are large Wastes and Commons, Forrests and Fens, to take away all power of improving them; for the same Land by improvement becomes able to support a great number of people which are the strength of the Kingdom.

And as there are great inconveniences on this side, so the other way there will be none at all, for they may enjoy the same Usages as Commoners; if they prescribe the ordinary way, and the Lord cannot do them any prejudice at all, he can only take the Surplusage, leaving them sufficient; if he feeds to their damage, it will be a Surcharge, and an Action upon the Case will lie against him.

The Lord cannot improve but he must leave them sufficient, and there can be no reason why the Owner should not have the Surplusage if any be.

I know they will cite an Authority against me in the Case betwixt Webb and Littleburgh, which was in C. B. 1654. There, I confess, the Declaration was grounded upon a Prescription much like to this, and the Plaintiff had a Verdict, and the Court would not arrest Judgment upon it.

The Answer that I must give to that Case is grounded upon the difference between a Demurrer and a Verdict.

The Court may intend that after a Verdict, which may help it; for I allow an exclusion of the Lord upon a Special Case disclosed in pleading, and that Special Matter may be supplied by the Verdict.

Besides I must observe, that it was a Case of small consequence that concerned the Lord only for his Costs, for he hath enjoyed his feeding against that Verdict ever since: I can say it upon my own knowledge; for I know the Parties, and know the Place, it was at Elinswell near Bury St. Edmunds in Suffolk. The Judges listen to Exceptions after a Verdict, but will give Judgment if there be any possibility to maintain it.

I may add that this was in Popular Times, when all things tended to the licentiousness of the Common People.

I shall Conclude, praying Judgment against this Prescription for these Reasons.

It is a new and unheard of way of Pleading, and against the Rule of Law, joyning Freehold Tenants, in the generallty, which have no relation one to another, and annexing an entire Interest to feveral Estates, and mixing Prescription and Custom, which are of contrary Natures and are great Absurdities.

It is against Reason to oust the Owner of all the feeding, which for ought appears is all the Profits, without any Special Matter or Recompence appearing in Pleading.

There is great inconvenience in admitting of such a Prescription, new Inventions bringing unknown Consequences.

No inconvenience in ousting Tenants of this Prescription, seeing that they claim the same Usage the ordinary way, and the Lord can do them no wrong either by feeding or improvement.

In this Case the Court of Common-Pleas had been divided in Opinion upon the Matter in Law, as appears by Vaughans Reports; and therefore Sir Henry North thought not fit to waive the Matter of Law in the Kings Bench, altho' he had so good a Case upon the Fact, that if it had been no prejudice he would joyn Issue and try the truth of this Prescription at the Bar; whereupon the Demurrer was by consent waived, and the Cause tried at the Bar, and the Verdict passed for Sir Henry North, with the approbation of the whole Court.

Afterwards another Action was brought to trial in the Exchequer at the Bar, and it appearing to the Court that there had been Proposals towards an Agreement, a Juror was withdrawn, and my Lord Chief Baron Hale gave the Tenants advice to comply with this, saying *Redime te captum quam queas minimo*.

So that the Matter of Law was never adjudged against Sir Henry North, but the Matter of Fact tried for him, and the main Question upon the Act of Level never came in Question, which may extend to this great Waste, altho' both the other Points were against Sir Henry North.

Afterwards there was another Action brought to trial in the Exchequer, and after a full evidence of about 4 or 5 hours, the Plaintiff not daring to stand the Verdict, was nonsuited.

T H E
C A S E
O F
Sir Robert Atkyns
A G A I N S T
H O L F O R D C L A R E,
Under-sheriff of the County of Gloucester;
T E R M I N O
Sancti Hillarij, Anno 22 & 23 Car. II.
In Scaccario.

Action upon the Case was brought by the Plaintiff, set. Vid. Co. ting 10th. That he was seized of the Seven Hundreds of Entr. 439. Crochon, Bright, Reppegate, Bradley, &c. in the County of a Quo War- Gloucester, and had Return and Execution of Writs there: That ranto brought the Defendant knowing of it, did Execute several Writs there to for these the Plaintiffs damage, &c. Upon Not Guilty pleaded Issue is Hundreds taken, and this Special Verdict is found, (viz.)

They find the Patent of 11 May, 5 Johannis, whereby the King restores to the Abbot and Convent of Canons Regular, in Cirencester, certain Lands granted to them by his Brother Richard the First; and also grants, That no Sheriff of Gloucester, or his Bayliff,

Bayliff, do intromit in aliquo within the Seven Hundreds, except for Pleas of the Crown and Summons, which the Abbot, &c. should receive from the hands of the Sheriffs, and execute.

They find the Patent of 20 Decembris, 17 E. 3. wherein the King reciting that Richard the first, by Patent granted to this Abbot and Convent the Mannor of Cirencester and the Seven Hundreds, and the Return of Writs in them, that thereby they had used and enjoyed *Retorna Brevium tanquam pertinentia ad Septem Hundred' prædict'*. Reciting also, that by a Presentment made it was seised into the Chancery, and that He (Edward the Third) for a Fine of 300 l. grants that they should hold the Mannor, Hundreds, Villis, &c. & quod haberent in Villis & Hundredis prædictis, &c. absque impedimento *retorna Brevium Infangthief, &c. tanquam pertinent'* Hundredis prædictis, &c. of the King and his Successors, &c. and confirms the Patent of King John.

They find, that the Abbot, &c. were seised prout Lex postulat till 4 Febr. 27 H. 8. when the Monastery was dissolved and all came to the Crown.

They find the Statute for vesting of these Lands, &c. belonging to the Monastery in the King and the Statute of 31 H. 8. cap. 20. whereby it is Enacted, That all Liberties, &c. which the late Owners of Monasteries had used, &c. shall be revived and be really and actually in the King, his Heirs, &c. and shall be in the Rule, Order, Survey and Governance of the Court of *Augmentations*, and that the same Liberties, &c. shall be used and exercised by such Stewards, Bayliffs, &c. as the King, his Heirs, &c. shall name and appoint, &c. and that the said Stewards, Bayliffs, &c. shall be attendant and obedient to all the King's Courts for all Returns of Writs, &c. as the Officers of the late Owners should have been, &c. and that no Sheriff, Under-sheriff, &c. should intromit, meddle in, with or upon the Premises otherwise, or for other cause than they lawfully might have done before the same Premises came to the possession of the King.

They find, that Edward the Sixth (being seised by descent from Henry the Eighth) Anno primo of his Reign, per Lit' Patent' ex gratia & advisamento Concilii sui dedit & concessit cuidam *Tho. Seymour Mil', Dom' Seymour de Sudley*, omnia illa Hundreds de *Crochen, &c. nuper Monasterio Cirencestrensi* dudum spectantia, &c. omnia Letas executiones Brevium & *retorna eorundem* Scil' Hundred', &c. reputat' spectant' & pertinent' Hundredis prædictis, &c.

They find, that the Lord Seymour being seised, &c. was Attainted of Treason (by Act of Parliament, 1 & 3 Ed. 6. cap. 18.) and that thereby his Lands and Hereditaments were forfeited and vested in the King.

They

Thirdly, Because it is a Case full of difficulty; but We that are Judges must satisfy our Judgments, and come to a Resolution, and I must Argue as the Law is, and not as I wish it. I Argue according to my Conscience, tho' somewhat against my desire, and I am sure against my particular Interest.

I shall be somewhat long, because the Case is very Intricate, and requires an Explication of many things.

In the first place I shall explain three Terms in the Case:

First, The Monastery of Cirencester.

Secondly, An Hundred.

Thirdly, Retorna Brevium.

First, As to the Monastery of Cirencester I shall speak a little Historically, to shew the tradition and derivation of this Matter: It was a Monastery time out of Mind; but in 30 H. 1. it was translated to the Canons Regular; and therefore Henry the first is accounted the Founder, he Endowed it with three Hides of Land. Richard the first gave them the Mannor of Cirencester, and the Seven Hundreds, at the Farm of 30 l. per annum. The Charter of Exemption (mentioned in the Verdict) was made by King John, who Confirmed the Grant of Richard the first at the same Farm. This you shall find in Chartæ Antiquæ Letter G. (for the Book goes by Letters) Number 9, and the Letter M. in Number 12.

Secondly, The next thing to be considered is an Hundred. Of old time Hundreds were parcel of the Crown, belonging of Common Right to the King, 11 H. 6. 89. pl. 44. by the Grant of an Hundred there did not pass only a Liberty, which had a Court and also commonly a Leet, which is called the Leet of the Hundred: But there was also an implied Power of making a Bayliff: The Bayliff had a double Office.

First, He had the Collection of Perquisites, Amerciaments, Fees; Ancient Duties, as Beupleader, Head, Silver, &c. belonging to the Hundreds in some places.

Secondly, He had another Office and that was relating to the Sheriff. In Ancient time the Bayliffs of the Hundreds were the immediate Bayliffs of the King for the Execution of Process. Vid. the Statute of Sheriffs made at Lincoln 9 Ed. 2. the second Statute; there 'tis said, that the Execution of Writs that come to the Sheriffs shall be done by Hundredors, (i. e. Lords; or rather Bayliffs of the Hundred) sworn and known in the full County, &c. which is Confirmed 2 E. 3. cap. 4. and 14 E. 3. cap. 9. This thing of Farming out Hundreds to persons thus, grew to be a great Inconvenience: For the Hundreds which were of the County, and did belong to the Sheriff, there was no Inconvenience; the Sheriff did sometimes Account as Custos, sometimes per Manus. Then those many Provisions were made, viz. 2 E. 3. cap. 12. whereas

all the Counties in England were in Old time Assessed to a certain Farm; and then were all the Hundreds and Wapentakes in the Sheriffs Hand rated to this Farm, and after were Approvers sent into divers Counties, which did increase the Farms of some Hundreds and Wapentakes. And after the Kings at divers times have granted to many men part of the same Hundreds and Wapentakes for the old Farms only. And now of late the Sheriffs are wholly charged of the Increase, which amounteth to a great Sum, to the great hurt of the People and dissension of the Sheriffs and their Heirs. It is Ordained, that the Hundreds and Wapentakes set to Farm by the King that now is, be it for Term of Life or otherwise, which were sometimes annexed to the Farms of the Counties where the Sheriffs be charged, shall be adjoynd again to the Counties, and that the Sheriffs and their Heirs have Allowance for the Time that is past, and that from henceforth such Hundreds and Wapentakes shall not be given nor severed from the Counties. Then 14 E. 3. cap. 4. Whereas many Mischiefs be happened throughout the Realm, for that Sheriffs have lett the Hundreds and Wapentakes to a higher Farm than they do yield to the King, and the Farmers do lett the same to others at higher and greater Sums in such manner, that by the letting and enhancing of the Farms, and by the Greater number of Bayliffs Errants, Outriders and others, whom the Sheriffs Bayliffs and Hundredors do put in, the People be in divers manners charged and grieved: It is assented and accorded, That from henceforth all the Wapentakes and Hundreds which be severed from the Counties, shall be rejoynd to the same Counties, as befoze this time hath been established by another Scature, and that the Sheriffs hold the same in their own Hands, and put in such Bayliffs and Hundredors, having Lands within the same Bayliffs and Hundreds for whom they will Answer: And if they will Lett any Hundreds, Bayliwicks or Wapentakes to Farm, they shall lett the same at the ancient Farm without any thing increasing, and that the King and his People be served by such Bayliffs and Hundredors, and their Under Bayliffs, in avoiding for ever the Outriders and others, which in divers Counties befoze this time have notoziously grieved the People: And that no Bayliff Errant be but in the County where Bayliffs Errants have been in times past, in the time of the King's Grandfather that now is, and that there be no more but one Bayliff Errant in one County: And in the same manner it is assented, That all other, of what Estate or Condition they be, which have Bayliwicks or Hundreds in Fee, if they the same will hold in their own Hands, then they shall put in such Bayliffs for whom they will Answer; and if they will lett the same in Farm to other, then they shall lett the same at the ancient Farm without any thing increasing, as aforesaid is said, &c.

For

For the Sheriffs did Farm at a certain Rate, and did Account for it in the Exchequer, and this was called *Firma Ballivarum*.

Hundreds were either parcel of the County, and there the Sheriff did constitute Bayliffs, (these Hundreds which were anciently parcel of the Farm of the Sheriffs, that the Stat. of the 2 Ed. 3. cap. 12. speaks of;) or else they were such as were granted out, which the Lord of the Hundred held sometimes at Farm, and sometimes in Fee. called Hundreds of Fee, Liberties of Hundreds, Franchises of Hundreds.

It was found that a great Inconvenience grew from the severing of Hundreds from the Counties. The Statute intended that the Sheriff should execute Writs, &c. and it was unreasonable that he should have Bayliffs put upon him, and yet be bound to Execute, &c. therefore the Statute intended to reconcile this as far as it could well, and to restore as many of the Hundreds as could well be, to the Sheriff.

Thirdly, I come to the Third thing to be Explained and Considered, viz. the Liberty of *Retorna Brevium*.

This is a superadded Liberty; tho' tho' Hundreds were granted, yet the Sheriff might and must still Return the Writs executed there. This Liberty was commonly annexed to the Grants of Hundreds, tho' sometimes of Mannors it is acquirable by Grant, and (I think) by Prescription, tho' that has been a Doubt: But 8 H. 4. c. 7. pl. 10. speaks of *Retorna Brevium* by Prescription, And it was Adjudged it might be so in the Quo Warranto brought by the Queen against the Earl of Shrewsbury, for *Retorna Brevium* and other Liberties claimed by the Earl in Coleharborow in London. You will find the Pleading in the New Entries, Quo Warranto pl. 2. Mich. 41 & 42 Eliz. in Banco Regis.

Vid. Mo.
670. contr.

'Tis true, It was Adjudged against the Earl; but it was Agreed that a man might prescribe for *Retorna Brevium*, and that to have it within a House only; for that Place was formerly the Bishop of Durham's Mansion House.

But the Prescription was naught, because it was applied only to the Return of the Writs of the Queen: For he laid a Prescription (in the Bishop of Durham) to have *Retorna omnium Brevium Preceptorum & Mandatorum dictæ Dom' Reginæ*, and says not of her Predecessors; and it is plainly impossible, that a man should have time out of mind the Return of the Queens Writs, when the Queen began her Reign within time of Memory.

This *Retorna Brevium* carries in it (by Implication) the Execution of Writs, tho' it be not express, as in the last preceding Case, where after the Words above mentioned is added, & *Executionem eorundem*.

And so it was Adjudged in the Case of the Countess of Warwick against Arwood, Pasch. 41 Eliz. Rot. 33 i.B.R.

This Liberty, tho' it carries an Exemption, yet it doth not exclude, but that the Sheriff may execute Writs within it. But then it is a Wrong, for which the Lord of the Liberty may have his Action: But in some Cases the Sheriff may lawfully do it, as in the Case of the King, a Non omittas, &c. in case of Execution of a Writ of Waste, whereto he is particularly Empower'd by the Statute, and sometimes where the Thing is divided, &c.

But I shall add no more concerning this, but only say,

First, This Liberty of Retorna Brevium is a dangerous Liberty for him that hath it; for he is to be Responsible for all the Defaults of his Bayliffs, as Escapes, &c. And if the Bayliff do not Account for the Collection of the King's Revenue, &c. 'tis a Feather in his Cap, but a Thorn in his Foot.

Secondly, 'Tis much derogatory to the Justice of the Kingdom: for the party must go to the Sheriff first, then to the Bayliff, &c. and by this means Justice is delayed and disappointed.

There are two Liberties so abundantly more hurt than they are worth, (viz.) the Grants of Fines, especially of Jurors, and this of Retorna Brevium: Wherefore Edward the first, a most Wise Prince, Declared in Parliament, and it was Recorded in the Courts, That he would not grant it. This you will find in the Pleas of Edward the first, towards the latter End, in Mr. Ryley. The Passage meant is in Placita Parliamentaria 35 Ed. 1. fol. 366. in Mr. Ryley, it is this,

Præceptum Domini Regis, LE Roy ad Dit & Commande, Quod apres cest Grant qu'il ad fait al un Counte de Nicole, de Return de Brief avoir, en deux Hundreds à terme de la vie du dit Counte, le Roy ne voet doner ne granter a nulluy tiel Franchise tant come le Roy vivra, s'il ne soit a ses Enfantès demesne, & ceo voet le Roy que soit Escrit en le Chancellerie, en Gardrobe, & al Eschequer.

Thirdly, A Grant of this Liberty was within a certain Precinct, and could not extend to a County, 2 H. 4. for as my Lord Coke observes on W.2. cap. 39. 2 Inst. 452. A Grant to have Return of Writs in a County is void; for in effect it taketh away the Office of a Sheriff.

By that time I have applied these Observations, I shall in effect have done.

First, It is to be Considered, Whether the Charters of King John did Create the Return of Writs, or no? seeing there are only Negative,

Negative, no Positive Words in it. Somewhat may be said to maintain this to be a good Grant of Retorna Brevium, but because the contrary has been admitted, I will admit it too, especially because the scope of the Patent was, that the Abbot should be immediate Officer to the King; and the intention of the Charter was to exclude the Sheriff, and that does appear by the conclusion, where an Exception is made of the Sheriffs Power of meddling per Summonitionem, &c. and so it is like the Case of the Town of Berwick in 5 Jacobi, a Grant to them that they should be a County, but no Grant of having a Sheriff, was adjudged to be void, because there would be no Officer to execute and do Justice. I do observe that 13 Ed. 3. in the Iter there was an Information against this Abbot, and he pleaded the Charter of R. 1. but there is nothing of Retorn of Writs that I can find, and I have read the Book over.

Secondly, We come to consider the Grant of E. 3. I say,

1. It is a good Grant of Retorna Brevium.

2. There is a good annexation of it to the Hundreds by reason of these words *tanquam pertinent' Hundredis predict'*, for even at this day such a thing as Common of Estovers, &c. may be granted appurtenant. Sacheverell against Porter, 13 Car. 1. 1 Cro. 482. 1 Rolls 400. 11. H. 6. 11 Pl. 27. Now then by this Patent here is a Retorna Brevium, not only newly created, but newly created appurtenant, and especially since here is a kind of cognation between the things, this may very well be; in like manner may Cognisance of Pleas be granted, if the King should grant that a Lord of an Hundred should have *cognitionem omnium placitorum*, &c. *tanquam pertinent' Hundred'*, &c. it would create Cognisance of Pleas appurtenant to the Hundred; for it being a Creature of the Kings it may be created as he pleases, either in gross or as appurtenant; for a thing appurtenant may be by Grant, though a thing appendant must be by Prescription.

Well now, this Abbot is seised of this Liberty *quodammodo* appurtenant.

3. When the Monastery, &c. comes to be dissolved and given to the King, it is to be considered what becomes of this Liberty then? I conceive this Liberty is in the hands of the King, as it was in the hands of the Abbot, (*viz.*) as appurtenant, and that without the aid of the Statute of 32 H. 8. c. 20. It is adjudged Keilway 72. Pl. 16. that this Liberty of Retorna Brevium when it comes to the King, remains in the Crown, and is not extinguished, rejoynded or drowned thereby.

And this Liberty is not by this coming to the Crown, reannexed to the County, but if that were a Question, the said Statute of 32 H. 8. hath put it out of question, for by that Statute it is in the same state that it was before. 'Tis true, the King might

might rejoyne it to the County, but till he does, it continues a Liberty distinct, an Hundred in gross, and the Sheriff shall write Ballivo Dom' Regis, &c. 'Tis true, if a man forfeit such a Liberty by non user or misuser, the Sheriff shall enter into it, and do, and execute as in other parts of the County, because in that case the King comes in in disaffirmance of the Liberty, but otherwise it is where the King comes in under a Subject, as in the Bar case he does.

Fourthly, We come to consider what alteration is made in the Case by the Grant to Seymour and his Attainder: As to this I must observe, that the Verdict is ill found, for 'tis concessit, &c. Dom' Seymour, &c. but not found what Estate, and here 'is a breaking off in the middle, of which we cannot tell what to make. Now when the King Grants, and expresses no Estate, some Books have held the Grant to be void; but the better Opinion is, that it creates an Estate at will, 5 E. 4. 8. (the last Leaf) B. Pl. 1. but 17 E. 3. 45. Pl. 46. is express in it, and so it was adjudged Pasche 8. Jacobi in Petfall's Case.

Davis 45,
45.

Why then the consequence will be, that by the Attainder the Will was determined, and then the King was in of his Old Reversion, and then the Statute of 32 H. 8. served well to preserve the Liberty in the same Estate still. But if the Grant were in Fee, then the King came in by a New Title, viz. the Attainder, and then there is no benefit of the said Statute; so that this Error in the Verdict is most to the disadvantage of the Party (the Defendant.) who would not amend it; for there was a Proposal and Discourse of amending, and some things were amended; but the amending of this Mistake would not be consented to by the Defendant. But to suppose this to be a Grant in Fee, I say still it stood of it self a Liberty without the Statute, and so when it returned to the Crown by Attainder, it stood not in need of any such Statute, it was Substantive and not melted down in a General Confusion into the Form whence it was derived.

Fifthly, Come we now to the Grant to Kingston: It has many Clauses in it, I will insist upon two.

1. The King Grants Omnia Amerciamenta, &c. with large words, Cognita, Reputata, Acceptata, &c. I did say that the Grant of E. 3. made an annexation of this Liberty of Rec' Brev. to the Hundreds; and if we should admit that, it were not sufficient to create an appurtenancy in reputation; and if it were no more than so, these words would lay hold on it.

2. The other Clause I will rest upon; whereby the King grants tota lialia & tanta, &c. as any, &c. hab' ratione vel pretextu Hundred' prædict' virtute pretextu, vel colore alicujus Doni, Chartæ, &c. Now certainly the latter words are subservient and ancillary

lary, and the *ratione vel pretextu* Hundredi governs all, for it is but one entire Sentence, like *Finches Case*, 6 Co. 39. This *pretextu* is a very large Clause and much more than *tot talia & tanra*, wherefore I conclude, that it is a good and sufficient Grant of the thing in Question.

Three Objections have been made, to which I shall endeavour to give Answers.

Object. 1. By the coming to the Crown the Liberty is merged.

Ans. 1. It is not.

2. Admit it were merged thereby, yet that is not till the dissolution. Why now in this last Grant there is a Retrospect, and it is with a leaping over to the Seisin which the Abbot had, and therefore the Grant of the King conjoyning it to the possession of the Abbot, the Liberty is effectually revived and erected in the same manner and condition as it was before the uniting of it to the Crown.

Object. 2. If this Liberty be to be revived, yet 'tis not revivable without Special Words; in the Grant to *Seymour* there are the words *Retorna Brevium*, but in the Grant to *Kingston*, not.

Ans. *Tot talia, &c.* does it, and 'tis as much as if all had been particularly recited, because it refers to a thing determinate.

'Tis true, if there were an Act of Resumption, as in *Pager and Darcy's Case*; or if the thing were merely Personal, as in the Abbot of *Walthams Case*, the privilege for his Dogs in the Forrest, such General Words will not revive and pass the things, because of the *ratio privata* which intervenes; but if there be nothing in the Case (which hinders) more than the generality of the words, 'tis clear the words do it; no Case can be fuller than *Ameredichs Case* is in this point, 9 Co. 29. B. 30. in the Case of *Coleharborow* above-mentioned. The *Ret' Brev'*, &c. came to the Crown by Act of Parliament. The King Ed. 6. grants to *Francis Earl of Shrewsbury* the House, & quod habeat *tot talia, &c.* specially reciting many Privileges, Liberties, &c. but not mentioning *Retorna Brevium*, and concludes, & alia, &c. and it was adjudged that this Grant in these general words did revive *Retorna Brev'* (for I have a Report of the Case) but only for the Cause above-mentioned Judgment was given against the Earl as to the thing.

This Verdict is ill found, the effectual Statute which should aid this Case if there were need is 1 Ed. 6. c. 8. which is not found; thereby it is Enacted, That all Letters Patents, &c. made or to be made by the King of any Honours, &c. Franchises, Liberties, &c. should be good, sure, &c. notwithstanding any misnaming, misrecital or nonrecital of the Premises, or the lack of the true naming
of

of the Natures, Kinds, Sorts and Qualities of them or any parcel thereof, and notwithstanding divers and sundry other suggestions and surmises, &c.

Object. 3. The Patent of *Ed. 3.* or at least this Patent made to *Kingston* is void by reason of the Statute 2 *Ed. 3. c. 12.* (and likewise 14 *Ed. 3. c. 9.*) whereby it is Ordained, *That henceforth the Hundreds and Wapentakes should not be given nor severed from the Counties.*

Ans. This indeed is the grand Objection and was materially objected by my Brother Littleton, and the Case of Fortescue against my Lord Coke has been truly scited to this purpose, which was in this Court, and is reported by himself. Now shall we do now in this great difficulty? Truly this Objection had need be strictly examined into, for it runs to the avoiding of the Grants of 100 Hundreds and more, which have been granted since 2 *E. 3.*

I do conceive this Grant of *Ed. 3.* is not within the Statute, for though it be a New Grant of *Re' Brev'* yet tis no New Grant of the Hundreds, neither is the Grant of *Ed. 6.* avoided hereby. For,

1. This Statute extends only to those Hundreds which were parcel of the Sheriffs Farm, and not to those which were divided, because as to the first only there was an inconvenience to the Sheriff, in that he should be charged with the Farm of the County (the Sheriffs Farm) and yet the profits, the *Firma Ballivarum* be taken from him. The words of the Statute are, *That such Hundreds (viz.) as were annexed to the Farms of the Counties shall not be given nor severed from the Counties, neither did these Hundreds come in to the Sheriff by their coming to the Crown: The Sheriffs Farm was modelled and settled long before; and when these Hundreds came to H. 8. they were not part of the Sheriffs Farm, but he made Bayliffs of his own there, and they were within the Surbey of the Court of Augmentations; so I say it refers only to those Hundreds which made a part of the Sheriffs Farm.*

2. None of these Statutes extend to prohibit a Grant of an Hundred in Fee. (I apprehend my Lord meant a Regrant of an Hundred, which before those Statutes had been granted out in Fee, for 2 *E. 3. c. 12.* rejoins and prohibits the Grant of those Hundreds only which were set to Farm by the King for term of Life or otherwise) The very words of the Statute 14 *E. 3. c. 9.* make provision for the Hundredors in Fee; tis said that they which have Bayliwicks of Hundreds, &c. shall answer for their Bayliffs. *Fitzh. Petition 1.* there is a complaint of one who is turned out of an Hundred be had in Fee because of the Statute called there the New Statute: And perhaps these Hundreds were seised, upon the like pretence, and that was the matter of the Presentment mentioned in the Grant of *E. 3.* or rather Re-Grant.

3. *Rei.*

3. Neither this Statute nor the Decree or Report of the Case in this Court does extend to this Case, for they are not to be understood of, nor extended to a Case wherein *Retorna Brevium* is granted; were not *Retorna Brevium* added, 'tis true the Grant of the Bayliwick might be void; where an Hundred is granted at this day the Grant is good; but by Virtue of this Statute the Sheriff may put in and use his Bayliffs there, the collection of the Profits, &c. the Grantee shall have but the execution of Writs is in subserbency to the Sheriff, (till I speak where no *Retorna Brevium* is granted) this Bayliff shall not be a Bayliff to the Sheriff in spite of his Teeth; and this was the very Case of Fortescue, he had a Grant of the three Hundreds of Newport: We find the Farm of these Hundreds formerly here in the Exchequer; the *Firma Ballivatus* in Chiltern, &c. the Farm of the three Hundreds of Newport was 5 l. then in 13 E. 3. 7 l. then in 23 E. 3. 9 l. then in R. 1. 10 l. &c. these were the ancient Farms; Queen Elizabeth grants a Lease of these three Hundreds to Fortescue for three lives at a certain Farm, but does not grant him *Retorna Brevium*. This grant indeed was adjudged void (*viz.*) as to the excluding of the Sheriff; observe what my Lord Coke saith in the Case, by the Statute, &c. (saith he) Hundreds are rejoined as to the Bayliwick of the same to the Counties; and all grants made of the Bayliwicks of Hundreds since that Statute are void, and the making of the Bayliffs thereof belong to the Sheriff for the better execution of Justice and of his Office, and so it was resolved, &c. the Grant at this day is good as to what belongs to the Lord (of an Hundred) but not as to the execution of Process, which belongs to the Sheriff; so that I say,

1. Consider the Grantee as an Officer for the collection of the Profits, &c. and so it is a good Grant.

2. Consider him as an Officer for the Kings Process, and so 'tis void, because the Sheriff ought not to have a Bayliff put upon him, and the Grantee shall not be the Sheriffs Bailiff, whether the Sheriff will or no. But,

3. I say if the Grant be with *Retorna Brevium*, then it is a good Grant as to the Bayliwick and all, for in that Case the Sheriff is at no inconvenience, for the Grantee shall do all, and shall be liable to all the Escapes, and all things done or suffered by him.

My Lord Coke was very wary in what he said about this matter, for he knew, and the truth is, if this Statute should make the Grants of Hundreds void, it would call in question most of the Hundreds in England, and particularly would shake his own Grants of Hundreds which he passed when Attorney General, and some of which his Posterity enjoy at this day. 8 H. 7. fol. 1, 2, 3, 4, 5. and 13 H. 7. fol. 19, 20. Pl. 2. is a great Case concerning an Hundred granted by Ed. 4. and afterwards by R. 3. wherein there are many

Questions much argued, whereof the chief is, whether a Leet may be granted and pass as part and parcel of a Hundred, and 'tis adjudged that it may; but it is the Opinion of all on all sides, that the Grant of an Hundred is good, and so much is implied and concluded in the Judgment; Coke upon Amerediths Case, 9 Co. 29, 30. there Judgment is given that the Grant of the Hundred is good.

I know that in 11 H. 4. by Special Act of Parliament (vid. 1 H. 4. c. 11.) the Sheriffs had an allowance made to them for several Hundreds, which had been parcel of their Farms and were granted away, which could not have been if this Statute had made the Grants void.

I think there ought to be Judgment for the Plaintiff.

Nevertheless I am glad with all my heart, that we are delivered of this Case, for truly if I could have found any Thing to satisfy my Judgment, I would have given Judgment another way, both for the General Concern and for the sake of the County of Gloucester which I know will suffer much by this thing.

One short Act of Parliament of three Lines, (viz.) That all Process should go with a *non omittas propter aliquam libertatem* (saving still the Liberty of a Mans House, which indeed the Law in all such Cases saves now) would avoid a great delay of Justice, many Suits and Vexations, grievous Wrongs and oppressions, and would do more good to the Kingdom than all the Liberties of *Retorna Brevium* have been worth these 100 years; for as they are used now, they are nothing but a foundation of Brocade and Mischief; they are a Feather in his Cap that has them, but they are a Thorn in the Foot of every one that has to do with them: For first the Party must go to the Undersheriff, and there he is handled; then through another Purgatory, to the Bayliff of the Liberty, and there he is handled; and then to the Underbayliff, and there he is handled; and then to the Sheriff again. I confess I drew a short Act once, and I wish some good man would now promote it.

It is adjourned into the Exchequer Chamber.

T H E
C A S E
O F
COLLINGWOOD and PACE
IN THE
Exchequer Chamber.

The Lord Chief Baron *HALE*'s Argument.

In the Argument of this Case I shall suppose as clear and unquestionable, these three things, viz.

First, That Patrick the Son, and William the Grandson of Nicholas the elder Brother are not inheritable to John the Earl, because though they are both Denizens born, yet Nicholas their Father, through whom they must convey their Pedigree, was an Alien.

Secondly, That as Patrick and William cannot inherit, so neither can they obstruct the Descent to John the Son of George, because being descended from an Alien, the Law takes no notice of them as to this purpose, otherwise 'tis if the said Nicholas had been a Denizen born and Attainted, because in such a case, though he could not take himself by Descent, he could obstruct the Descent to the younger Brother, so the Land would Escheat.

Thirdly, That the Case of George, the Son naturalized, and the Case of John his Son, as in reference to John the Earl, and the Descent from him will be all one; if George had survived him, John the Earl might have inherited; so will John his Son, who jure Representationis, is the same with his Father, Et à Converso.

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These things being unquestionably to be admitted before I come to the Argument of the Case, I shall premise certain General Observations.

First, Touching Descents.

Secondly, Touching the Capacities or Incapacities of an Alien.

Thirdly, Touching Naturalizations.

Touching Descents I shall consider,

First, The Rule whereby they are to be Governed.

Secondly, The various kinds of Descents or hereditary Successions.

Concerning the Rule of Descents, we must not govern our selves therein by the General Notions of Law or Proximity of Nature, but by the Principal Laws of the Country where the Question ariseth; for the various Countries have variously disposed the manner of Descents, even in the same Law or Degree of Proximity.

For Instance.

The Father is certainly as near of Kin to the Son as the Son is to the Father, and is nearer in Proximity than a Brother, and therefore shall be preferred as next of Kin in an Administration, 3 Rep. Ratcliffs Case.

Yet touching the Succession of the Father to the purchase of his Son, the Laws of several Countries variously provide.

First, According to the Jews, for want of Issue of the Son, the Father succeeds, excluding the Brother, and that hath been the Use and Construction of the Jewish Doctors, upon Number 27. Selden de Successionibus, Hebr. Cap. 12.

But the Mother was wholly excluded.

Secondly, According to the Greeks, the Provision for the Succession of the Father is left doubtful, Petre Leges 1, 6. fol. 6.

According to the Romans or Civil Law, by the Construction of the Law of the Twelve Tables, the Father succeeds in the purchase of the Son for want of Issue of the Son under the Title of Proximus Agnatus, and accordingly was their Usage, tho' my Lord Coke supposed the contrary, Co. Lit. 5. But to settle all, the Institutes of Justinian, Lib. 3. Tit. 3. in an Authentick Collection, 8. Tit. de Hæred' ab intestato venientibus, the Son dying without Issue, his Brothers and Sisters, Father and Mother do succeed him in a kind of Coparcenary as well to Lands as Goods.

According to the Customs of Normandy, which in some things have a Cognition with the Laws of England, the Son dying without Issue, his Brothers are preferred before the Father, but the Father is preferred before the Uncles, Terrien. lib. 6. c. 6. la Customier de Normandie, cap. Descheants.

5. According to the Laws of England, the Son dying without Issue, or Brother or Sister, the Father cannot succeed, but it descends to the Uncle. And it is a Maxim of the English Law, An Inheritance cannot Lineally ascend.

Consequently, the Question being in this Case touching a Descent of Lands in England, it must be Ruled and Disputed according to the Grounds and Reasons of the Laws of England.

Secondly, Touching the Second, the Division of Descents are of two kinds:

First, Lineal, as from the Father or Grandfather, to the Son or Grandson.

Secondly, Collateral or Transversal, as from Brother to Brother, Uncle to Nephew, or e converso. And both these are again of two sorts:

First, Immediate, as in Lineals from Father to Son.

Secondly, Mediate, as in Lineals from Grandfather to Grandson, the Father dying in the Life of the Grandfather, when the Father is the medium differens of the Descent.

Thirdly, In Collaterals, from the Uncle to the Nephew, or from the Nephew to the Uncle, where the Father is likewise the medium differens.

And I call this a Mediate Descent, tho' as to many purposes it be Immediate; for the Father dying in the Life of the Grandfather, the Son succeeds in point of Descent of the Laws immediately to the Grandfather; and in a Writ of Entry shall be supposed in the Per to the Grandfather, and not in the Per and Qui.

But I call it a Mediate Descent, because the Father is the medium through or by whom the Son derives his Title to the Grandfather.

Therefore if any man thinks the term of Mediate Descent not properly used, he may if he please use the words of Mediate or Immediate Ancestors. Words are imposed to signify Things, and therefore the Terms being explained what I mean by them, I shall retain the Terms of Mediate or Immediate Descents.

This distinction of Descents or Relations between Ancestor and Heir, and Hereditary Succession, will be of use throughout this whole Debate.

In Immediate Descents there can be no Impediment, but what arises in the parties themselves.

For Instance,

The Father seised of Lands, the Impediment that hinders the Descent must be either in the Father or the Son; as if the Father or the Son be Attainted, or an Alien.

In

In Immediate Descents, a Disability of being an Alien or Attainted in him that I call a medius Ancestor, will disable a person to take by Descent, tho' he himself hath no such Disability.

For Instance,

In Lineal Descents: If the Father be Attainted or an Alien, and hath Issue a Denizen born, and dies in the life of the Grandfather, the Grandfather dies seised; the Son shall not take, but the Land shall Escheat.

In Collateral Descents:

A. and B. Brothers, A. is an Alien or Attainted, and hath Issue C. a Denizen born. B. purchaseth Lands and dies without Issue, C. shall not inherit; for A. (which was the Medius Ancestor, or medium differens of this Descent) was incapable, Dyer 174. Gray's Case.

And this is apparent in this very Case; for by this means Patrick, tho' a Denizen, and the Son of an Elder Brother, is disabled to inherit the Earl.

A. and B. Brothers, A. is an Alien or person Attainted, and hath Issue C. and dies, and C. purchaseth Lands and dies without Issue. B. his Uncle shall not inherit for the Reason beforegoing; for A. is a Medius, which was disabled. This is Courtney's Case.

And if in our Case Patrick the Son of Nicholas, altho' a Denizen born, had purchased Lands and died without Issue, John his Uncle should not have Inherited him by reason of the Disability of Nicholas; and yet Nicholas himself, had he not been an Alien, could not immediately have Inherited to his Son; but yet he is a Block in the way to John. See the Reason 17 E. 4. cap. 1.

But this must be intended of such as are absolute Impediments, as Attainder or Alien, not Temporary suspensions: As in the Lord Delaware's Case in 10 Co.

But in any Descents the Impediment of an Ancestor that is Medius Ancestor, between the persons from whom and to whom, will not impede the Descent.

The Grandfather and Grandmother both Aliens, or Attainted of Treason, have Issue the Father a Denizen, who hath Issue the Son a Denizen; the Son shall be Heir to the Father notwithstanding the Disability of the Grandfather: For they are not Medii antecessores between the Father and the Son, but Paramount; and yet all the Blood the Father hath he derived from his disabled Parents.

And this Observation states in effect the Case.

For if the Descent between Brothers be an Immediate descent, and that the Father be not Medius antecessor between them, then the Disability in Robert will not impede the Descent of George his

his Brother, or to John his Brother's Son. But if it be a Mediate descent, and the Father be a Medius antecessor between them, then the Disability in Robert the Father may impeach the Descent.

The Second Term to be explained, is that disabling Term of an Alien, and to consider what Disability ariseth from it. The Law that is the Rule of Descents in England, is also the measure of this Nonability, and is the only Rule that must determine how far it extends.

Therefore I consider, what Disability the Law doth induce in case of an Alien.

It doth not hinder, but that an Alien is of the same Degree and Relation of Consanguinity as in the like cases of a Denizen born. The Son, Father and Brother tho' Aliens, are yet Son, Father and Brother as Natural born Subjects, and so taken notice of in our Law.

In Cro. Car. Carroon's Case, he shall be preferred in Administration as next of Kin.

Secondly, What the Law doth do as to Disabilities of an Alien: And this is of two kinds.

First, the Disability that is Personal or Original to the Alien himself, in reference to Inheritance.

Tho' he may take by Purchase by his own Contract that which he cannot retain against the King, yet the Law will not enable him by Act of his own, to transfer or Hereditary descent, the Alien dying, having since a Denizen born, the Land will not descend.

As to take by an Act in Law: say the Law, quæ nihil frustra, will not give an Inheritance or Freehold by Act in Law, for he cannot keep it.

And therefore the Law will not give him,

1. Descent.
2. Courtesy.
3. Dower.
4. Guardianship.

And in respect of this Incapacity he doth resemble a person Attaint; yet with this difference, the Law looks upon a person Attaint as one that it takes notice of: And therefore the eldest Son Attaint, over-living his Father, tho' he shall not take by Descent in respect of his Disability, yet he shall hinder the Descent of the younger Son.

But if the Eldest Son be an Alien, the Law takes no notice of him: and therefore as he shall not take by Descent, so he shall not impede the Descent to his younger Brother, 32 E. 3. Cousenage 5. A consequential Consecutive Disability that reflects to an Alien from one that must derive by or through him, tho' he perchance be a Natural born Subject.

As

As in our Case, tho' Patrick the Son of Nicholas be a Natural born Subject, yet because Nicholas his Father was an Alien, there is a Consecutive Impediment derived upon Patrick, whereby he is Consequentially disabled to Inherit John his Uncle; and this Consecutive Disability is parallel to that which we call Corruption of Blood, which is a Consequent of Attainder.

If the Father be Attainted, the Blood of the Grandfather is not Corrupted, no nor the Blood of his Son, tho' he could not inherit him, but only the Blood of the Father: But that Corruption of Blood in the Father draws a Consequential Impediment upon the Son to inherit the Grandfather; because the Fathers Corruption of Blood obstructs the transmission of the Hereditary descent between the Grandfather and the Son.

And here we must take notice of a great diversity between a Disability in the Blood and a Bar.

Cro. Car. 16. Edwards and Rogers's Case. William Rogers was seised of a Reversion in Fee, Andrew his Uncle levies a Fine with Proclamations and dies, having Issue John, who dies leaving Issue William; then William Rogers dies without Issue. Ruler, that William the Grandson of Andrew shall inherit, notwithstanding the Fine of his Grandfather; and the Reason is, because William Rogers dying after Andrew, the Estate never passed through Andrew, and consequently William the Grandson claiming from William, is in effect a Stranger to the Fine of Andrew, and may aver that Partes, &c.

But in that Case had Andrew been an Alien, or Attaint, then had William his Grandson been disabled to have inherited William by the Consecutive Disability.

Now in the Case at Bar, there is first no doubt but that John the Earl and George were Brothers, tho' they continued Aliens; neither is there any question that they could not have inherited one the other had they continued Aliens; neither is there any question whether that Personal Disability be removed by the Naturalization.

But the Question is, Whether any Consequential or Consecutive Disabilities do result upon them from their Father Roberts being an Alien, which may disable the one Brother to inherit, tho' there Personal disability be removed? I come now to the Explication of the Third Term, (*viz.*) the Restoring or Enabling Term, Naturalization.

The Means of removing Disabilities of this kind are two:

A temporary, partial and imperfect amotion thereof, Letters Patents of Denization, which tho' it puts the Person Denized as to some purposes in the Condition of a Subject, and enables a Transmission Hereditary to his Children born after the Denization; yet it doth not wholly remove the Disease of Nonability, as to the point

point of Descents of Hereditary Transmission, and resembles a Pardon in case of an Attainder.

And therefore in Lineal Descents, if there be Grandfather a Natural born Subject, Father Alien, Son Natural; the Father is made Denizen, he shall not inherit the Grandfather; and if the Father dies in the life of the Grandfather, the Grandchild, tho' born after the Denization, doth not remove either the Personal; or the Consequential Impediment of Incapacity of the Father.

In Collateral Descents the Father a Natural born Subject hath Issue two Sons Aliens, who are both made Denizens, and one dies without Issue, the other shall not inherit him. This was agreed in Godfrey and Dixon's Case, hereafter cited.

The Second is more deep, (*viz.*) Naturalization.

According to the Laws of Normandy they may Naturalize, but such Naturalization shall not divest a Descent already vested. Terrien lib. 2. cap. 12.

But according to our Law it can only be by Parliament; and not otherwise.

And this cures the Defect, and makes them as if they had been Born in England; and no man shall be received against an Act of Parliament to say the contrary; and therefore if the Father an Alien hath Issue a Son born here, and then the Father is Naturalized, the Son shall inherit.

If the Father a Natural Subject hath Issue a Son an Alien, who is Naturalized; the Father dies, the Son shall inherit, Co. Lit. 129.

Touching the retrospect of a Naturalization, and whether the Son being an Alien Naturalized after the death of the Father, shall direct the Descent to the youngest, depends upon the words of the Naturalization, which being by Act of Parliament, may by a strange retrospect direct it.

But as the Naturalization in the Case in question is Penned it would not do it, the Naturalization hath only respect to what shall be hereafter.

The Clause of taking by Descent, after the Commencement of the Session of Parliament, is sufficient to check that Retrospect.

And this brings me to the Consideration of the Naturalization in the Case in question, and the Effect thereof, which I shall not Argue as a Point; because I take the Point of the Case to be single: But I shall deliver my Opinion of it by way of Conveyance to the Case.

(Read the Naturalization.)

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First,

First, In this Naturalization I shall set down, what Effect it hath. And,

Secondly, What Effect it hath not.

First, What Effect it hath: It doth doubtless remove that Inability and Incapacity that is in John the Earl and George, in respect of themselves, being Aliens, and so put them in the Condition as if they had been Born in England.

But if there be a Consequential Impediment of Incapacity derived upon them by Robert, their Fathers being an Alien, which might hinder their Successions one to another, which at the present I suppose, or admit: I say, if there be any such Consequential Impediment, this I take is not removed by this Naturalization.

My Reasons are briefly these:

First, Because this Act of Naturalization hath a proper Subject upon which it may work, and with which it is satisfied, (viz.) the Personal defects of the Parties Naturalized; because this Defect arising from the Incapacity of the Father is not in any measure taken notice of by the Act, nor so much as mentioned that the Father was an Alien.

By the whole scope of the Act, and every Clause of it, and those Relative Terms (As if Born in England,) is only to supply the Personal defect of the Parties Naturalized, arising from their Birth out of England, and therefore shall never be carried to a Collateral purpose.

Touching the Objection.

Tho' this Remedy will not Cure a Disease of another nature, as Illegitimation, Half-Blood, &c. yet it Cures all the defects of Foreign Births, whether in the Parties themselves, or resulting from the Ancestors. And the Act might have been so Penned as it might have done it; but it is not.

The Plaister is applied only to defects in the arising from their own Birth; not defects arising from the Father, or that Consequential disability arising thereby.

Second Objection.

But we find in Curteen's Case, Placita Coronæ 241. that where the Father was Attainted, the Restitution in Blood granted by the Act to the Son, cures that disability that results from the Fathers Attainder; and this not only to the Son, but also to the Collateral Heirs of the Father.

And I have before observed, the Corruption of the Blood by Attainder, is only of the Blood of the Father; for the Son's Blood was not at all Corrupted. By this Act of Restitution,

1. Notice is taken of the Father's Attainder.
2. It doth Intentionally provide against it, and it was the only business of that Act to remove it.

3. Had

3. Had it not remedied that Corruption of Blood it had been useless; for there had been nothing else for it to provide against, and so the Restitution had been idle had it not had that Effect. But in our Case the Naturalization, as it takes no notice of the defect in the Father, nor provides against it; so it hath another business to satisfy, it doth remedy the Foreign Birth of the Son.

And let us examine the several Clauses in this Act of Naturalization, we shall find the whole scope of it was no other, than to put them in the same and no better Condition, than as if they were Born in England. This is the Governing Clause, both in the first and last Sentence, and hath an influence upon all the Clauses that intervene.

It hath been endeavoured to break the Context, and to make the Clause (As if Born in *England*) to be cumulative and superabundant.

But this were by a Nicety to alter the scope and intent of the Act.

If it were omitted; yet the first Clause making him but a Natural Born Subject to all intents and purposes; surely makes him no more, and meddles not with the disability of his Father, or the Consequence thereof.

There hath been some stress laid upon the Clause, which enables him to make his resort and Pedigree to Ancestors Lineal or Collateral, as if that should Entitle George at least to some more advantage by Naturalization, than if he had been Born here.

But to this I say,

First, That is a General Clause, and cannot make a Legal Ancestor.

Secondly, Upon the same Reason it may make John or George inheritable to Patrick, and not adjudge the disability of Nicholas his Father, which no man pretends.

It makes him as much inheritable to Ancestors Lineal, as well as Collateral; and yet it makes no Ancestors Lineal. The Words are General, and create no new Ancestor, that the Law doth not enable.

It is true, that in the Argument of Godfrey and Dixon's Case, especially Mountague laid some stress upon these Ancillary Clauses; but the rest rather rested upon the very Matter, that the party Naturalized was become thereby a Natural born Subject.

And thus I have done with the Naturalization, which doth not Cure any disability of Transmission Hereditary between the Brothers, resulting from the disability of the Father, if any such be.

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But

But it doth cure the Personal disability in John and George, and makes them to all intents as Natural Subjects as if they had been born in England. So that now the Case made is no more than this :

An Alien hath Issue two Sons born in England, and one purchaseth Lands and dies without Issue, whether the other shall inherit ?

For, as I have before observed, the Case of John the Son of George is all one with the Case of George himself, whom he represents ; as to the Point of the Descent from John the Earl.

Before I come to the Argument of the Question, the Verdict had need be delivered from a Question, which possibly would make an end of the Dispute.

It hath been said, that if the Wife of Robert were an English Woman, there would be no question but the Land might descend between the Brothers John and George, tho' Robert the Father were an Alien ; and that it shall be so intended, because nothing appears to the contrary.

To this I say,

It is true, that if the Mother were an English Woman, the Descent from John to George his Son would be unquestionable : For notwithstanding the Incapacity of Robert the Father, by being an Alien, they might inherit their Mother, and consequently they might inherit one the other.

It hath been endeavoured to be Answered, that it is not possible the Mother could be an English Woman, because the Sons are found to be Aliens.

But that will not be so, altho' an English Man marry an Alien beyond the Seas, and having there Issue, the Issue will be Denizens, as hath been often Resolved : Yet it is without question, that if an English Woman go beyond the Seas and marry an Alien, and have Issue born beyond the Seas, the Issue are Aliens ; for the Wife was sub potestate viri, and yet the Issue born in England should inherit tho' the Husband be an Alien.

But the true Answer is, That in this Case Robert the Husband being an Alien, born out of the Allegiance of the Crown of England, and marrying, and having all his Issues born there, She shall not be presumed an English Woman, but shall be presumed a Native in Scotland, where her Husband lived and had Issue, unless the contrary had been expressly found.

Now touching the Point in question, it is true that Sir Edw. Coke in his Litt. fo. 8. is of another Opinion : He says, That if an Alien have two Sons born in England, and one dye without Issue, the other shall not inherit him. But I take the Law to be the contrary.

First,

First, I will shew what Reasons do not move me.

Secondly, What Reasons do convince and satisfy me.

It doth not move me thus to conclude, because there is no defectus Patriæ, or Nationis or Ligeantix of either of the Brothers; for tho' there be no personal defect in either of the Extremis, yet it may be possible that a consequential Impediment arising from another Ancestor, may hinder the Discend; and this is apparent in the Case in question, for Patrick the Son of Nicholas the Elder, Brother of John the Earl, hath no Defectus Ligeantix, for he was naturalized, yet the Land shall not Discend from John the Earl to Patrick by reason of the defect of Nicholas his Father, neither doth it move me that George or John his Son do not claim the Land from Robert the Father, but from John the Earl, for if the Grandfather be seized, the Father is an Alien.

The Son a Denizen born, the Father dies in the Life of the Grandfather, the Son shall not inherit by reason of the defect of the Father, tho' he claim nothing from him, but from the Grandfather.

But the Reasons that satisfy me are these three in order as they are propounded.

My first Reason is, because the Discend from a Brother to a Brother, tho' it be a Collateral Discend, yet it is an Immediate Discend, and consequently upon what hath been premised at first; unless we can find a disability or impediment in them, no impediment in another Ancestor will hinder the Discend between them.

Now to prove this Discend Immediate, I shall use these three ensuing Instances or Evidences.

First, In point of Breeding, one Brother shall derive himself as Heir to another, without mentioning another Ancestor; this hath been at large insisted on by others, and therefore I shall pass it over.

Secondly, According to the computation of Degrees, according to the Laws of England, Brother and Brother make one Degree, and the Brother is distant from his Brother and Sister in the first degree of Consanguinity.

According to the Civil Law, the Brother is in the second Degree from the Brother, for they make one Degree from the Brother to the Father, and from the Father a second Degree to the other Brother; but yet they say in Collaterals, Nullus est proximior Fratre, ideoque in Collateralibus nullus est primus Gradus, sed secundus Gradus obtinet vocem primi, *Inst. lib. 3. Tit. B. de Gradibus Consanguinitatis*.

According to the Canon Law, Frater & Frater, Soror & Soror, sunt in primo Gradu, *Decret' gratian Laws 35. quest. 5. ad sedem*, and therefore their Laws prohibiting Marriage in the fourth

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Degree, take Brother and Sister to be the first Degree of the fourth.

The Laws of England, in computation of the Degrees of Consanguinity, agree with the Common Law, and reckon the Brother and Sister to be the first Degree, and this is apparent by Littl' sect. 20. and the Objection of Lord Coke thereupon, and the Book of 31 E. 3. Hollands Case cited by Littleton.

And with this likewise agrees the Laws and Custome of Normandy, which tho' in some things they differ from the Law of England, as is before observed, yet in this particular and divers other touching Descents, they agree with it, Vid. Glov. Com. super Customeir de Normandy, in Cap. de Escheat, *Er doit un' Scavoir que tonque le Custome de paijs de Normandy pur compter les Degrees en Line Collateral solonque les Cannoists deux freres ont le premier Degree & cont que un Degree.*

By third Evidence that the Descent between Brothers is immediate, thus (viz.) the Descent between Brothers differs from all other Collateral Descents whatsoever, for in other Descents Collateral the half Blood doth inherit, but in a Descent between Brothers, the half Blood doth impede the Descent, which argues that the Descent is immediate.

The Uncle of the part of the Father hath no more of the Blood of the Mother, than the Brother of the Second Venter.

The Brother by the second Venter hath the immediate Blood of the father, which the Uncle (viz) the Fathers Brother hath not, but only as they meet in the Grandfather.

The Brother of the half Blood is nearer of Blood than the Uncle, and therefore shall be preferred in the Administration.

And so it hath been resolved in 5 E. 6. in Browns Case, and tho' the Book of 5 E. 6. B. Administration 47. mistakes the Law in preferring the Brother of the half Blood before the Mother, yet it had been right in the case of a Competition between him and the Uncle.

And yet the Uncle is preferred in the Descent before the Brother of the half Blood, and the reason is, because that is a mediate Descent, mediant Patre; but the Descent to the Brother must be immediate if at all, and therefore the half Blood impedes it.

Again, it is apparent, that if in the Line between Brother and Brother the Law took notice of the Father as the Medium thereof, the Brother by the second Venter should rather succeed the other Brother, because he is Heir to his Father; therefore in a Descent between Brothers the Law respects only the mediate relation of the Brothers as Brothers, and not in respect of their Father, tho' it is true the Bosom or Foundation of their Consanguinity is in the Father and Mother.

By

My second principal Reason is to prove, that the disability of the Father doth not at all hinder the Discent between the Brothers immediate is this,

If the Father in case of a Discent between Brothers, were such an Ancestor as the Law looks upon as the Medium that derives the one Discent from the other, then the Attainder of the Father would hinder the Discent between the Brothers.

But the Attainder of the Father doth not hinder the Discent between the Brothers.

Therefore the Father is not such a Medium or Nexus as is look'd upon by Law as the means deriving such Discent between the two Brothers.

Both the former Propositions, and indeed the Illustration and Enforcement of the whole reason, will be evidenced by the comparison of three Cases, the two former of the Cases evincing the truth of the first Proposition, and the later proving the second Proposition.

The first is Graves's Case 10 Eliz. Dyer 274. The younger Brother hath Issue and is attaint of Treason and dies, the elder Brother having a Title to a Petition of Right, dies without Issue, without a Restitution, the other Brothers Son hath lost that Title; for though that Title were in an Ancestor, that was not attainted, yet his Father that is the Medium whereby he must convey that Title, was Attainted, and so the Discent is obstructed.

On the other side, the Case of Courtney, in Cro. Car. 241. Henry Courtney had Issue Edward, and is attaint of Treason and dies, Edward purchaseth Lands, and dies without Issue, the Sisters and Sisters Children of Henry are disabled to inherit Edward, yet neither Edward nor his Aunts were attainted, nor their Blood corrupted, as is before manifested, but only Henry; tho' the Land could not descend immediately from Edward, yet because he who nevertheless was the Medium whereby the Aunts must derive their Pedigree and Consanguinity to Edward was attainted, the Discent was obstructed till a restitution in Blood.

But suppose that the Grandfather of Edward was attainted, and not Henry, this could not have hindered the Discent from Edward to his Aunts, because the Attainder had been paramount, that Consanguinity which was between Henry and his Sisters, as Brothers and Sisters, and that is proved by the third Case.

In 40 & 41 Eliz. in the Exchequer, Hobbies Case, William Hobby had Issue Philip and Mary, and is attainted of Treason and dies, Philip purchaseth Lands, and dies without Issue; Ruled that notwithstanding the Attainder, Mary shall inherit, because the Discent between Philip and Mary was immediate, and the Law regards not the disability of the Father, and in that Case all the Reasons

Reasons that have been objected against the Discent in the Case at Bar, were objected.

If it be objected that in that Case the Mother was not attainted, which might preserve the Legal Blood between Philip and Mary.

I Answer, That that would not serve, admitting the disability of the Parents were not at all considerable; for if it disable the Blood of the Father which is derived to the Son, it would infallibly destroy the Discent to Mary the Sister, for she could not inherit her Brother in the capacity of Heir to the part of the Mother, if by the Attainder she had been disabled to take as Heir by the Fathers Blood, 49 E. 3. 12.

If the Heir on the part of the Father be attainted, the Land shall escheat, and shall never descend to the Heir of the Mother, because notwithstanding the Attainder, the Law looks upon it as in esse; but otherwise it is in case of an Alien, as hath been before shewn; for if the Son purchase Land and have no Binden on the part of his Father, but an Alien, it shall descend to the Heir of the part of the Mother.

And altho' the Blood both of the Father and the Mother were in Mary, yet if she were disabled in the Blood of her Father by his Attainder, she could never intitle her self by the Blood of her Mother.

I have done with this Reason, there remain two Principal Objections to be answered.

Object. 1. The Father in the Case at Bar, is the Fountain from whence the Blood of John and George is derived, and their Consanguinity ariseth not from one to another, but from their Father, which is the common *vinculum* to them both, and therefore this disability in the Parents destroys the Civil Relation of Hereditary Blood between the two Brothers.

I Answer First, The very same Objection might be, and indeed was made in Hobbies Case, but prevailed not.

Secondly, But further, no man will say but that the Blood of the Father and Mother are necessary to derive Consanguinity in the Son, for the Blood of the Father without the Mother is impossible to be derived to the Children; and yet no man will deny, that if the one or the other were Denizen born, their Children should inherit one the other.

Thirdly, But the truth is, the Father and the Mother are the Blood Natural to both the Sons, but it is the Law into which by their Birth or Naturalization they are translated, that is the Fountain of the Civil or Hereditary Blood; the Parents are the common Vinculum, the Fountain of their Blood, that aliquod tertium in quo conveniunt in regno naturali, but it is the Law of the Land

Land into which by their birth, or naturalization they are transplanted, the Commune Vinculum, that aliquod tertium in quo conveniunt in Regno Civili.

Object. 2. But all their blood that they have is derived from their Parents, and they can take no other blood but what they have from them; and if that blood which the Parents transmit be stained, and void of Hereditary Quality, no hereditary blood can intervene between them.

I Answer, It is true that their natural blood is derived from their Parents, and as it is that that makes them Brothers Sons, so it is that that makes them their blood; but yet the civil qualification of their blood which makes them inheritable one to the other is from another fountain (viz.) the Law of the Land; and this Law finding them Legitimate & utrinque conjunctos sanguine parentali naturali, and so natural Brothers, and finding them transplanted into the civil rights of this Kingdom by their birth here or Naturalization, which is all one, doth superinduce and close the natural Consanguinity, with a civil hereditary Quality, whereby they may inherit one the other.

For Instance,

A. Grandfather and B. his Wife, both Aliens, have Issue C. a Son born here, who hath Issue D. a Son also born here.

No body can deny that C. hath all his natural blood from A. and B. and no where else; nor is that blood that he hath so from them, an inheritable blood, yet is it unquestionable that D. shall inherit C. and D. hath no natural blood but what he hath from C. nor C. no natural blood but what he hath from A. and B. But true it is, the Law doth superinduce that civil hereditary Quality upon the blood of C. by his birth in England, tho' as he took it from his father and Mother it was void of that Quality; the Law of Nature made him indeed Son, but it was the Law of England that gave him a capacity to be an Heir in England, or to have one.

My third and last Reason is indeed more general, tho' not so conclusive as the two former were upon the particular Reason of the Case, tho' not altogether to be neglected. (viz.)

The Law of England which is the only ground, and must be the only measure of the incapacity of an Alien, and of those consequential results that arise from it, hath been always very gentle in the construction of the disability, and rather contracting than extending it so severely.

For Instance,

The Statute de natis ultra Mare 25 E. 3. declares that the Issue born beyond Sea of an English Man upon an English Woman shall be a Denizen, yet the construction hath been, tho' an English

Merchant marries a Foreigner, and hath Issue by her beyond the Sea, that Issue is a natural born Subject.

In 16 Cro. Car. in the Dutchy, Bacons Case, per omnes Justic' Angl'.

And accordingly it hath been more than once Resolved in my Remembrance, Pround's Case of Rent.

The Case of the Postnati, commonly called Calvin's Case, the Report is grounded upon this gentle Interpretation of the Law, tho' there were very witty Reasons urged to the contrary; and surely if ever there were reason for a gentle Construction even in the Case in question, it concerns us to be guided by such an Interpretation since the Union of the two Kingdoms, by which many perchance very Considerable and Noble Families of a Scottish Extract may be concerned in the consequence of this Question both in England and Ireland, that enjoy their Inheritances in peace. I spare to mention particulars. So far therefore as the parallel Cases of Attainder warrant this extent of this Ability I shall not dispute, but further than that I dare not extend.

Now as touching the Authorities that favour my Opinion, I shall not mention them, because they have been fully Repeated; and the later Authorities in this very Case are not in my Judgment to be neglected.

Touching the Case of Godfrey and Dixon, it is true it doth differ from the Case in question, and in that the Father was made a Denizen and then had Issue a younger Son, who inherited the elder Son an Alien born, but Naturalized after the death of his Father; yet there is to be observed in that Case, either the Naturalization of the elder Son relates to his Birth, or relates only to the Time of his Naturalization; whether it did relate, or not, depends upon the words of the Act of Naturalization, which I have not seen.

If it did relate, the Cause in effect will be no more, but an Alien hath Issue a Natural born Son, (so; so he is, as I have Argued, by his Naturalization) and then is made a Denizen, and hath Issue and dies, the elder Son purchaseth Lands and dies without Issue, the younger Son shall inherit; the elder should not have inherited his Father, by reason of the Incapacity of the Father.

But it doth not relate further than the Time of his Naturalization, which was after the time of the Death of his Father, and consequently he could not divest the Heirship of his younger Brother; yet if he purchaseth and dies without Issue, his younger Brother shall inherit him, tho' there was never Inheritable Blood between the elder Son and his Father, so much as in fiction or relation.

Upon

Upon the whole Case I conclude,

First, That there be two Brothers Natural born in England, the Sons of an Alien, the one shall inherit the other.

Secondly, That the Naturalization puts them in the same Condition as if born here, tho' it does not more.

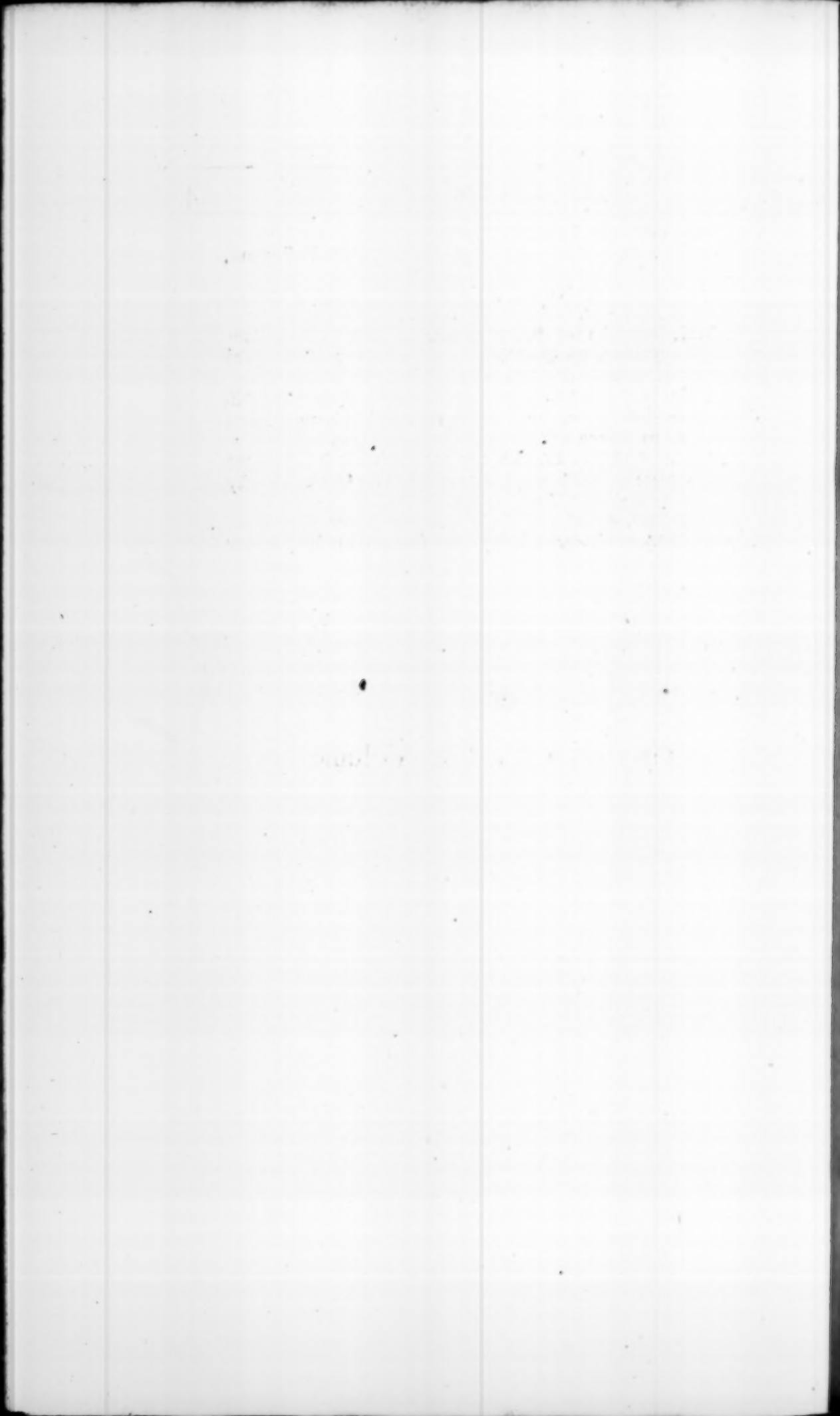
Thirdly, That John the Son of George stands in the same Condition of inheriting his Uncle, the Earl, as George should have done had he survived the Earl.

Fourthly, But if the Disability of Robert the Father had disabled the Brothers to have inherited one the other, the Naturalization of the Earl of George had not removed that Disability.

Fifthly, But no such Disability of the Father doth disable the Brother George to inherit the Earl; it neither doth Consequentially disable John the Son of George to inherit the Earl.

Consequently, as to the Point referred to our Judgment, John the Son of George is Inheritable to the Land of John his Uncle.

The End of the First Volume.



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REPORTS

OF *J. 13. 24*
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L A T E
One of the Justices
 OF THE
COMMON-PLEAS.

CONTAINING
 Select C A S E S Adjudged in the COURT of
 Common-Pleas, in the Reigns of K. CHARLES II. and
 K. JAMES II. and in the Three first years of the Reign of His now Majesty
 K. WILLIAM and the late Q. MART; while he was a JUDGE in the
 said COURT.

With the Special PLEADINGS to the same.

A L S O
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 upon Writs of E R R O R from the Kings-Bench.

Together with many remarkable and curious Cases in the Court of Chancery.

Whereto are added
 Three exact TABLES; One of the Cases, the other of the Principal Matters,
 and the third of the Pleadings.

With the Allowance and Approbation of the LORD KEEPER
 and all the JUDGES.

L O N D O N:

Printed by the Assigns of Richard and Edward Atkyns, Esquires: for
 Charles Harper at the Flower-de-Luce, and Jacob Tonson at the Judges-
 Head, both over against St. Dunstan's Church in Fleetstreet, MDCXCVI.

THE
SECOND PART
OF THE
REPORTS
OF
SIR JOHN LEACH



Printed by the Assigns of Richard and Richard, Stationers, for
Thomas Bland at the Lion and Lamb in the Strand
LONDON
and all the Judges

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The Defendant avows for *Damage fasant*; and sets forth, that *E. M.* being seized in Fee, demised the *Locus in quo* to the Avowant, to hold at Will.

That he entred and was possess, and took the Colt *Damage fasant*; prays Judgment and a Return, and Costs and Damages, according to the Statute.

The Plaintiff pleads in Bar to the Avowry, That *E. M.* demised the *Locus in quo* to him before the pretended Demise to the Defendant, to hold for 6 years.

That he entred and was possess; and that the Defendant took his Colt there, *absque hoc* that *E. M.* demised to the Avowant *modo & forma*, as he hath set forth 211

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That the *Conversion* in this Action, and the *Taking* in the other, is the same.

That the Cause of Action was the same in both.

And that the Plaintiffs and Defendants are the same.

Et hoc parati sunt verificare unde petant Judicium si prædicti, the Plaintiffs Actionem suam versus eos habere debeant, &c.

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W E

WE all knowing the Great Learning and Judgment of the Author, do (for the Benefit of the Publick) approve of and allow the Printing and Publishing of this Book, Intituled, *The Reports of Sir Peyton Ventriskr. Late One of the Juslices of the Court of Common-Pleas.*

*April the 20th,
1695.*

**J. Somers, C.S.
J. Holt,
Geo: Treby,
Ed: Nevill,
Joh. Powell,
W. Gregory,
N. Lechmere,
Tho. Rokeby
G: Eyre,
Jo: Turton,
John Powell,
Sam. Eyre.**

I

The Second Volume.

TERMINO
SANCTI
HILLARII,

Anno Vicefimo primo & secundo

Caroli Secundi,
IN
COMMUNI BANCO.

Craw versus Ramsey.

In an Ejectment of Lands and the Rectory of Kingston upon Thames, in Surrey.

Upon Not Guilty pleaded, the Jury found a Special Verdict to this effect; (viz.)

That Robert Ramsey, Born in Scotland before the Accession thereof to the Crown of England, had Issue four Sons, Robert, Nicholas, John and George, Antenati; Robert died (they do not find when) leaving Issue three Daughters, Margaret, Isabel and Jane, who were also Aliens, and alive 1 Octob. 14 Car. 1. Nicholas had Issue Patrick, born in England 1 May 1618. They also find, that at the Parliament holden 10 Car. 1. in Ireland it was Enacted, That all Persons of the *Scottish* Nation should be reputed the Kings Natural Subjects to all intents, constructions and purposes of that his Realm of *Ireland*, as if Born there. And they find the Act of Parliament at large.

Nicholas Ramsey was alive at the making of that Act. John the third Son (afterwards Earl of Holderness) was Naturalized by Act of Parliament in England 1 Jacobi, and purchased the Lands and Rectory in question; and being seised 22 Jac. by Indenture Tripartite, between him of the first part, Sir William Cocke and Martha his Daughter of the Second part, and Charles Lord Effingham of the Third part; In Consideration of a Marriage to be had between him and Martha, did Covenant to Levy a Fine to the use of himself for Life, and afterwards to Martha for Life, the Remainder to the Heirs Males of his Body, the Remainder to his own right Heirs.

And 29 Septemb. 22 Jac. the Marriage was had, and the Michaelmas Term after a Fine was Levied accordingly. The 24 of Jan. 1 Car. 1. the Earl died without Issue, Martha Entred and was seised for her Life, and died 17 Car. Recodem anno it was found by Office, that the Earl of Holderness died seised of the Rectory, as before, and without an Heir; and that King Charles (anno decimo) granted this Rectory to one Murray.

George (the fourth Son of Robert) was Naturalized by the Parliament here 7 Jac. He had Issue John the Defendant. Nicholas died. Patrick his Heir in 1651. bargained and sold to the Earl of Elgin and one Sydenham, virtute ejus & vigore Statuti, &c. they were seised prout Lex postular; and in 1662. bargained and sold for years to Amabel Countess of Kent and Jane Hart; and afterwards Released to them and their Heirs in 1665. They being seised, bargained and sold by Lease and Release also to Pulles and Neale, who Entred, and bargained and sold to Sir Lionel Talmaish and West, the Lessors of the Plaintiff, upon whom John the Defendant Entred.

Upon which the Action is brought, and the great Question in the Case was, Whether Patrick the Son of Nicholas might claim these Lands, as Heir to the Earl of Holderness, by virtue of the Act of Parliament in Ireland, 10 Car. or that they should descend to the Defendant the Son of George, Naturalized the 7 of Jac. in England?

Wyld and Archer (who Argued first) were of Opinion, That however the Point was adjudged the Plaintiff could not have Judgment upon this Verdict; for they do not find that Patrick entred or was seised, but that he in 1651. did bargain and sell, &c. Virtute ejus the Bargainees were seised prout Lex postular; and then bargained and sold in 1662, and do not so much as find their Bargainees seised prout Lex postular: But they find the Defendant Entred, and so the primer Possession is in him, which is a good Title against the Plaintiff, for whom none is found, it not being found that Patrick Entred,

Again,

Again, If the Naturalization in Ireland will serve in England; the Title appears for the Daughters, the Heirs of Robert the eldest Son; for 'tis found that he died, but not when, so it might be after the Act of 10 Car.

But Tyrrell, and Vaughan Chief Justice, differed in these two Points.

As to the First, They said it would be intended; Patrick entered for a Verdict that leaves all the Matter at large to the Judgment of the Court, will be taken sometimes by Intendment, as well as where the Jury Conclude upon a Special Point. 2 Cro. 64. And an Incumbent Resigned, the Resignation shall be intended accepted. So in 4 Co. Fullwood's Case it was found, that one came before the Recorder of London and Mayor of the Staple, & recognovit se debere, &c. and did not say, per scriptum suum Obligatorium, nec per formam Statuti, yet intended so. Vid. Hob. 262. And where they find the Bargainees seized prout lex postulat, that doth not leave it doubtful whether seized or no, but whether by right or wrong; for Seisin must be taken as found expressly. Neither do they find any other in possession, nor that the Defendant made any Claim in Twelve years after, which enforces the Intendment as before: And it is found expressly that Pullen and Neale Entered in 1665. so that the Defendant had not the primer Possession, however, or if he had, he should not have Judgment if no other Title were found for him, as is Resolved in 1 Cro. 42. Hern and Allen's Case.

As to the Second, It shall be intended Robert died before 10 Car. for he is found an Alien, and shall be presumed to have continued so during his Life, unless found to the contrary; then the Descent to the Daughters is obstructed by the Incapacity of their Father. And tho' when the Title is found for the King the Court shall adjudge for him; because the Kings Courts are intrusted with his Rights, 'tis not so of any other person: but they shall take no notice of any Title found for a Stranger.

Wherefore they held (notwithstanding these Omissions in the Verdict) that Judgment might be given for the Plaintiff.

And Tyrrell was of Opinion, in the Principal Matter, for the Plaintiff. In his Argument he considered of divers kinds of Allegiance natural and acquired, which was either local or legal; As when a man is Sworn in the Leer, Denized by the Kings Letters Patents, obtained by Conquest, or Naturalized, which Naturalization must be by Act of Parliament, and cannot be limited. 2 Cro. 539. 1 Inst. 129. who is to all purposes a Natural born Subject. An Indictment of Treason against such an one is contra naturalem ligeantiam. Neither can it be confined to Place; for 'tis due to the Natural, and not to the Politick person of the King, Mo. 790. And the Plea of infra ligeantiam Regni sui Angliæ was rejected in

Calvin's Case in Co. and said to be never heard of before. *Idem est nasci, & idem naturalizari.* And he Argued, That in regard Ireland hath the like Court of Parliament that England hath, it hath also the same Power, and conceived that the English Laws were introduced by Parliament in King John's time: For in the Charter 11 H.3. it is recited, that Johannes quondam Rex Anglie duxit secum in Hiberniam Viros discretos & legis peritos, quorum Communi Concilio & ad instantiam Hibernentium statuit, &c. & ex diuturnitate temporis omnia presumuntur solenniter esse acta. In the 4 Inst. 357. it appears that Parliaments were holden there before 17 E.3. 2 R.3.12. Hibernia habet Parliamentum, & facium Leges. And in 4 Inst. 452. it is said, they may Naturalize an Alien; and if they do so, he is all one with an Irish man born: As one that purchased his Freedom in a Corporation, hath all Immunities as amply as he that is born a Member of it. Neither doth it follow from hence, that an Act of Parliament in Ireland could bind England; it is the Law of England Cooperating with the Act, that gives the Naturalization an effect here. The Act is but remotio Impedimenti: As if one were Attainted by the Parliament there, he should forfeit his Lands here, and if that Act were Repealed he should be restored to them again; yet neither Act were obligative to England: The Act of Ireland is causa remota, or sine qua non; the Law of England is causa proxima, and this of Naturalization was one of the Wonders of the Powers and Privileges of Parliament; As Legitimation of a Bastard, and the like.

The other three Justices were of a contrary Opinion, and Argued to this effect: That Ireland was a Conquered Kingdom, the Conquest compleated, if not begun in B. Henry the Second's time; in whose time there is no Record of any Establishment, and being a Christian Kingdom they remained Governed by their own Laws, until King John (Anno 12 Regni sui, by Charter, (so) so they conceived it to be, and not by Parliament;) for it appears that the Nobles were sworn, which is not usual in Acts of Parliament, neither is it. Teste Rege in Parlamento introduced the English Laws; yet it hath ever remained a distinct Kingdom, viz. from the bringing in the Laws by King John, M. Paris Hist. 230. and Calvin's Case in 7 Co. 22, 23. the Conquest brought it infra Dominium Regis, sed non infra Regnum Anglie. Orurke committed Treason in Ireland, and it was held tryable by Commission, by 33 H.8. as a Treason out of the Realm. 20 H.6.8. the Judges here are not bound to take notice of the Laws of Ireland. Fitzh. tit. Voucher 239. A man in Ireland cannot be Vouched. Anderf. 262, 263. 2 Inst. 2. it is said, Magna Charta, nor the Statute Laws here, did not extend to Ireland until Poinings Law, 10 H.7. tho' in truth it appears to be before by 8 E.4. cap. 10. neither are they obliged by

by any Statute since unless named, Dier 303. It is said of Lands holden in Capite in England and Ireland; that there ought to be several Liberties and by several Seals 11 Ed. 4. 7. When the King went into Ireland it was held to be a *Capage Royal*. And Wyld said, Two Kingdoms could not be united but by Act of Parliament; and there ought to be reciprocal Acts; and so is my Lord Coke 4 Inst. cap. Scotland. But this the Chief Justice said in his Argument, was not requisite in case of a Conquered Nation, which hereby had lost its Original Right of holding Parliaments; but he agreed in case of Kingdoms independent one upon the other. He said he had a Charter whereby Gascoigne, Guyan and Callice were united to England in Ed. the 3ds time, and recited to be by mutual pact upon a Peace concluded, that Wales, was fully conquered in Ed. 1st. time; whereupon they all submitted *de alto & basso* to the King; and it appears he abrogates some Laws, makes some new, and continues others, and Wales was united and consolidated with England, in H. 8 time by Act of Parliament here, but there was no Act on their part; neither is Ireland only a distinct Kingdom, but also subordinate. A Law enacted here to extend to all the Kings Dominions shall bind Ireland; Writs of Error have been always brought here to reverse Judgments in Ireland; and they naturally lie as the Chief Justice said into all subordinate Kingdoms, Fitz. tit. Ass 362. A Writ of Error to reverse a Judgment given in an Assize in the County of Glamorgan, and 21 H. 7. 31. B. it is said many Writs of Error have been brought to reverse Judgments given in Callice tho' it was alleged the Civil Law there was in use.

So the Romans allowed Appeals out of every Province subordinate unto them, as appears by the Case of St. Paul in the Acts, and 'tis against Nature that the Inferiour should have any influence upon the Superiour; suppose a Bill of Naturalization were brought into Parliament here and rejected, and after it should pass in Ireland, should it have the same effect as if it had passed here? If this might have been, what needed the endeavours in the beginning of King James's Reign to obtain an Act for the Naturalization of all Scots, and the Union of both Kingdoms, when an Act in Ireland would have been as effectual, and procured with much greater facility? Neither is the Parliament of Ireland equal to that of England, for that might be aliened by an Act of Parliament, as Gascoigne and Guyan were by mutual Consent, tho' the King cannot do it alone; therefore King John's Grant to the Pope was held absolutely void; but Ireland could not be transferred from the Sovereignty of England by any Act there, for they cannot discharge themselves of their Subordination to England. H. 3. granted to Ed. 1. *Terram Hibernicam*, and it was held to be void,

40 Ed. 3. 4 Inst. 357. And if they should make an Act there, that no Writ of Error should lie into England, the Chief Justice said it would be void. for their Power is merely precarious as to the Parliament of England, though not to the King in regard of his Charter: Wherefore he said it might be questioned whether they could Naturalize at all, for the King cannot alone, and their Power is wholly derived from this Charter, neither hath it been attempted by them until 10 Car. 1. when the Earl of Strafford was Lieutenant there: Whereas it was said on the other side, that to be Naturalized in Ireland was the same thing as to be born in Ireland; he denied it, unless they added by the Laws of Ireland, i. e. the Law gives him there all the Privileges a Native hath; but this was not *ligeantia nata*, sed *dada*, and therefore can extend no further than the Power of them that gave it; and tho' it be said an Act of Parliament can do any thing, that must be understood as to civil things, which are but the Creatures of Men, therefore may be altered and disposed at the will of the Supreme Authority; but natural things are not within its Power: for an Act of Parliament cannot make a Man a Woman, or a Man to be born in any other place than where he was really born, tho' it may give him such privileges as one hath that is born there, viz. such as are within their Power and none else; and 7 Co. 18.B. The time of the Birth is of the essence of a Subject born, and after in Calvins Case 27. it is said natural Ligeance respecteth the time of the Birth, and he cannot be a Natural Subject who was born under the Allegiance of another King, for a Natural Subject is the correlative to a Natural Prince, and one naturalized there, might in all respects be compared to an *antenatus*, who differed from a *postnatus* in these two things.

First, He was another Princes Subject before a Subject to the King of England.

Secondly, Such an one might have been an Enemy, whereas a born Subject may be Traitor, but can never be an Enemy. Now the Subjects of a Prince that conquers another Kingdom become immediately Denizens of that Kingdom, But not *e converso*, as was held in Calvins Case, of the *antenati* in Scotland: But the Subjects of a King who is Homager to that King, shall not be Aliens in any of his Dominions, as in Wales before the Conquest of it in Edw. the 1st Time, the like in Scotland, as appears Dier 304. Pl. 57. A Scot was indicted of a Rape, who pleaded not guilty, and prayed a *Trial per medietat' Lingue*, and it was denied, for that a Scot was never accounted an Alien, sed potius Subject, tho' the Chief Justice was of Opinion they ought not to have judged so there, because the Homage of Scotland had been lost so long before: The Statute of 5 Eliz. is, that none shall set up a Trade unless he hath been an Apprentice to it by the space of seven years. Suppose an

an Act were made in Ireland, that it should be lawful for J. S. to set up a Trade tho' he had never been an Apprentice; this would enable him there, but no man would say that thereby he should have liberty to set up here: No, tho' the words of the Act were as if he had served seven years. So the Law is, that no man can be naturalized here but by Act of Parliament; here Naturalization is a great point of State-Interest, therefore the King cannot do it by his Charter. And the inconvenience would be very great if naturalization in Ireland should extend hither; for tho' it was objected we might obviate it if found to be so, by disallowing these Acts, which, before they pass there, are sent hither and remitted under the Great Seal, and so we may repeal these Acts; yet it was said the like Power, by consequence, must be yielded to Scotland, and we cannot disannul these Acts, so they shall introduce what Aliens they please amongst us without controul. And tho' it was said a naturalization there would do us no harm, for it could never be made appear, because no Certiorari could be awarded from hence thither; yet it is manifest there are ways of making it appear. In 43 Ed. 3, 2. Lord Beaumonts Case, it is said that part of Scotland was within the Kings Ligeance and part without, and that the King kept a Roll of such Places as he had under his Subjection, and the Party was directed to petition the King to certify whether Rosse were so or no; so the King must be Party to their Acts there, and therefore may certify them, or they may be given in Evidence as Foreign Laws, or the Sentences in the Ecclesiastical or Civil Law Courts. Now we must not always conclude a thing not to be Law, because it is inconvenient; but that for which there is, neither Practical Custom, Judicial Precedent or Act of Parliament to warrant, may be well judged to be so.

Wyld and Archer in their Arguments did much insist upon the particular penning of this Act, where the Makers did seem to intend that the effect of this Naturalization should be confined to Ireland; for the Preamble recites this, Your Majesties Realm of Ireland will be much impaired for want of Scottish Planters, and that 100000 were planted in the Province of Ulster; there it enacts, That they and all Scottish shall be deemed Your Majesty's liege Subjects of this Your Realm of Ireland, and this your Realm repeated almost in every Clause, which would lose its force if the naturalization should be construed to have a larger extent. They also took notice of the proviso of the Act, That it should not extend unto any Lands whereof any Office was found for the King, and seised into his hands: And here was an Office found 17 Jacobi; they also mentioned the Statute of 7 Jacobi c. 2. which Enacts, That the Bill of Naturalization shall be twice read, unless the Person hath received the Sacrament within a Month before, and also taken the Oaths of Allegiance and Supremacy.

*Vide 2 Cro.
484. a Cer-
tiorari to re-
move a Re-
cord taken
at Callis.*

To the first Tyril answered.

First, That Naturalization could not be restrained, at least, not by affirmative words, for it doth not say Your Realm of England and not elsewhere; the Act hath also these words, as born of Irish Parents, as natural born Subjects, and other words as full as may be; also the Act of Naturalization of John and George in England hath the same words mutatis mutandis, viz. of this Your Realm, and in others they are more restrictive, viz. from henceforth shall be deemed, &c. the Irish Act is that they shall be deemed Natural Subjects; that they shall inherit such Lands as have descended after the first day of King James's coming to the Crown of England; this hath no such restraint.

As to the Second he answered, it was the Rectory only which was found in the Office. The Countess also was alive at that time, and so could not be seized into the Kings hands. And as to the Statute of 7 Jacobi it is plain, that it means a Naturalization by Parliament here; for it appoints the Lord Chancellor or Keeper to Administer the Oaths if the Bill begin in the House of Lords, and the Speaker to do it if it begin in the House of Commons. And of this Opinion was Vaughan in these three last things, tho' in the principal Matter he agreed with the other two.

Termino

Termino Sanctæ Trinitatis, Anno 22 Car. II.

In Communi Banco.

Thoms Harrison & Ux' *versus* Dr. Burwell.

In an Action for suing in the Spiritual Court after a Prohibition sued out and delivered, the Plaintiff sets forth that by an Act of Parliament, made in the 32 H. 8. c. 38. it was enacted, &c. That from the first day &c. all and every such Marriages as within this Church of *England* should be contracted between lawful persons (as by this Act they declared all persons to be lawful that be not prohibited by Gods Law to marry) such Marriages being Contracted and Solemnized in the face of the Church, and consummate with Bodily Knowledge, &c. should be, &c. deemed, judged and taken to be lawful, good, just and indissoluble, notwithstanding any precontract, &c. and notwithstanding any Dispensation, Prescription, Law, or other thing granted or confirmed by Act or otherwise, and that no Reservation or Prohibition, Gods Law except, should trouble or impeach any Marriage without the *Levitical Degrees*; and that no person of what Estate, Condition or Degree whatsoever he or she be, should, &c. be admitted to any of the Spiritual Courts within this the Kings Realm, or any his Graces other Lands and Dominions, to any Process, Plea, or Allegation contrary to this foresaid Act.

And sets forth further, That one Abbot had Issue Robert and Bartholomew; that Robert had Issue Mary, who married Robert Harrison, and by him had Issue Thomas the Plaintiff; that Bartholomew took to Wife Jane Brown, who is now the other Plaintiff, and that Bartholomew died without Issue, and that then the Plaintiffs intermarried; they say that he and she were free from any Marriage or Contract with any other person, and the Marriage was solemnized according to the Orders and Rules of the Church, and that this is a good Marriage by the Laws of God and Man; and that A. B. a Notary intending to dissolve this Marriage (contrary to the said Act) cited the Plaintiffs, before Dr. Burwell, and attitled against them in this manner, That within the Jurisdiction, &c. (reciting the Alliance, &c.) and that the said T. H. took the said Jane Abbot to Wife, *de facto, cum de jure non potuit nec debuit*, and so they committed Incest, &c. Hereupon Dr. Burwell Denies and prays a Consultation. It had been divers times argued at the Bar, and now Vaughan Chief Justice delivered the Opinion of the Court in this manner.

¶

Vaughan

Vaughan. 'Tis the pleasure of my Brothers, that I deliver their Opinion in this Case, and what I do deliver, I do not deliver as their Opinion only, but as the Opinion of all the Judges of England; for they have met together by the Kings Command several times to debate and consider of this Case, and they all agree that no Consultation be granted: This is a Case of great expectation, and perhaps the only Case which has been solemnly resolved since the Statute of 32 H. 8. was made; there are but three Cases concerning it, Man's Case, 1 Cro. 228. Mo. 907. Parson's Case, 1 Inst. 235. and Remington's Case, Hob. 181.

I must in the first place premise, that perhaps if we the Judges had been makers of the Law, this Question had not been; but we are to proceed upon the Laws as made, and cannot alter them: This is not a thing of our promotion, and this I speak to satisfy such as might object against us, This Statute was made in a time when the Popes Power was warmly pursued, and Laws were then made, which in the circumstances of another time would not have been made. I will first give the Reasons the Judges went upon in their Resolution; and then I will also give some Reasons to satisfy People abroad, for I know the Case will meet with many censures.

First, Of the former. Antiently the Kings Temporal Courts had nothing to do with the lawfulness or unlawfulness of Marriage, it was wholly of Ecclesiastical Consiance; the Statute de Circumspecte agatis, is, that the Temporal Judges should not punish the Spiritual Courts for holding Pleas of those things quæ mere sunt spiritualia, viz. pro Fornicatione, Adulterio & hujusmodi; and Sir Ed. Coke 2 Inst. 488. expounding those words, Ex hujusmodi, he says, and he says very right, that these are to be taken for Offences of like nature, as the two Offences here particularly expressed, viz. as solicitation of any Womans Chastity, which is lesser than these, and for Incest which is greater: Here is an undoubted evidence, that the Temporal Courts used to prohibit, &c. and the ancientness of that is unquestioned; but it seems they did border in their Prohibitions, sometimes upon things which were Spiritual, which they ought not to have done: There was no time but in which some Marriages were lawful and some unlawful; but if a man were formerly questioned about such a matter, he had no relief from the Temporal Courts. By the Ancient Common Law, Marriages were unlawful as far as they had names of Binded, viz. to the fourth Degree, from Cousin Germans inclusively, and therein it irritated the Civil Law; but in the Council of Lateran, under Pope Innocent the 3d it was ordained thus, Sancitum est prohibitionem copulationis conjugalis quartum gradum non excedere, and so it stands in all places under the Common Law at this day in Popish Countries; with

with 'tis it has received alteration by this Statute, in this matter there is a Reason very much sticks with many, viz. That the Temporal Courts are not skilled in the Laws by which this is to be judged, and therefore that it is not fit that they should determine concerning it; 'Tis true, the word *Cognitio* signifies both, but yet there is a great difference between Skill and Cognizance. But I say further, That the Temporal Judges may well enough have both; for though the knowledge of the Canon Law be not adequatum subjectum to a Common Lawyer, yet 'tis commune subjectum.

There are four Statutes which have made great alteration in the Cognizance of this matter, 25 H. 8. 22. 28 H. 8. c. 7. 28 H. 8. c. 16. and this of 32 H. 8. c. 38.

The first indeed is repealed, because it was interwoven with matter of Succession of the Crown, &c. which was set aside. But the Second, viz. 28 H. 8. cap. 7. is syllabically the same as to this purpose; the words are, Since many inconveniencies have fallen, &c. by reason of Marriages within the Degrees of Marriages prohibited by Gods Laws, that is to say, the Son to marry the Mother, or the Stepmother carnally known by his Father, the Brother the Sister, the Father his Sons Daughter, or his Daughters Daughter, or the Son to marry the Daughter of his Father, procreate and born by his Stepmother, or the Son to marry his Aunt, being his Fathers or Mothers Sister, or to marry his Uncles Wife, carnally known by his Uncle, or the Father to marry the Sons Wife, carnally known by his Son, or the Brother to marry the Brothers Wife, carnally known by his Brother, or any Man married, and carnally knowing his Wife, to marry his Wives Daughter, or his Wives Sons Daughter, or his Wives Daughters Daughter, or his Wives Sister. So these Marriages are declared to be plainly prohibited and detested by the Laws of God, and not to be dispensable with by any man; and therefore 'tis enacted that no person shall thenceforth marry within these Degrees, what pretence soever shall be made to the contrary thereof: And in case any person have married within these Degrees, and by any the Archbishops or Ministers of the Church of England be separate from the Bond of such Unlawful Marriage, that every such separation shall be good, &c. And in case there be any person thus married, and be not yet separate, that every such person shall be separate by the definitive Sentence and Judgment of the Archbishops, Bishops and other Ministers of the Church of England, &c. and by no other Power or Authority; and that all Sentences and Judgments given, and to be given by any Archbishop, Bishop or other Minister of the Church of England, &c. shall be definitively firm, good and effectual to all intents, and observed and obeyed without suing any Prohibitions, Appeals, Prohibitions or other Process from, or

to the Court of Rome, to the Derogation thereof, or contrary to the 24 H. 6. c. 12. 'Tis very observable, and perhaps it has not been observed before, that the words of the Statute do not run so as commonly it seems, for if the words had been by reason of marrying within (or against) the Prohibition of Marriage by Gods Laws, there had been little question that there had been any other marriage against Gods Law (in the Intention of this Parliament) but those reckoned up; but the words are, marrying within the Degrees of Marriage prohibited, &c. Every man apprehends that for the Son to marry the Mother is forbidden, and that for the Father to marry the Daughter is within the same Degree, tho' not expressed; so for a Grandson to marry his Grandmother is within the same Degree of what is there forbidden: So whereas the Text, Leviticus 18. v. 14. forbids a man to marry his Fathers Brothers Wife, (for so the Text is) tho' the Statute expresses it his Uncles Wife; to marry the Mothers Brothers Wife is within the same Degree, tho' not mentioned in Leviticus, &c. The Judges did observe this only, but did give no Opinion concerning Marriages within the Degrees (viz. which are within the Degrees paritate rationis only, and are not expressed) such as Parsons and Manns and Remingtons Case, in all which the Case was, a man married his first Wives Sister, which by Equity and Parity of Reason was perhaps within the Prohibition, ver. 12, 13. that a man should not marry his Aunt, or rather the Prohibition, ver. 14. that a man should not marry his Fathers Brothers Wife, &c. but only in one particular, viz. that in the ascending and descending Parental-Line, the Marriages are prohibited *in infinitum*, but for the rest which are in *pari gradu* to the Degrees there mentioned, they have not given any resolution at this time.

Now as to this Case, in the second Statute there is observed this difference, that the words carnally known are added, where the Prohibition is in respect of a former Marriage of one of the Parties, as the Son to marry the Stepmother, carnally known by his Father, or to marry his Uncles Wife, carnally known by his Uncle, &c. this indeed is not particularly expressed and applied to every individual Prohibition, to which 'tis applicable in the first Statute; but methinks 'tis intended and as fully provided for (tho' in general) in the last Clause of the said first Statute, which is this, provided always That the Article in this Act contained concerning Prohibition of Marriages within the Degree aforementioned in this Act, shall always be taken, interpreted and expounded of such Marriages (i. e. I suppose former Marriages) where Marriages were solemnized and carnal knowledge was had

In neither of these two Acts is there any Power given to the Temporal Courts, to make any alteration as to the Canon Law; or God's Law; but it was referred to the Canon Law, and the power of Dispensing *de facto* left in the same state as before: And Dispensations were granted in these very particulars, which the Statute says ought not to be done.

The Third Law which concerns this Case is the 28 H. 8. cap. 16. against Dispensations, &c. from Rome, by which all Marriages which stood upon these Dispensations became absolutely unlawful; for the Dispensations are made thereby clearly void, &c. and therefore there is a provisional Clause in it, That yet notwithstanding at the most humble Petitions of the Lords and Commons, &c. all Marriages had and solemnized before the 30th of November. Anno 26 of the Kings Reign, &c. whereof there is no Divorce or Separation had by the Ecclesiastical Laws of this Realm, and which Marriages be not prohibited by God's Laws, limited and declared in the Act made in this present Parliament, for the establishing the King's Succession, (*viz.*) 28 H. 8. cap. 7. aforementioned) or otherwise by Holy Scripture shall be, &c. good, &c. and reputed, taken and adjudged, &c. as good, &c. if no impediment of Matrimony had ever been between them that have contracted and solemnized such Marriages.

If the Act had gone no further than these words (For the Establishment of the King's Succession) it had clearly brought the Cognizance of these Marriages to the Temporal Courts.

But 'tis Objected, That this Law made no such alteration, because of the words which are added, Or otherwise by Holy Scripture; for this 'tis said makes it directly of the Cognizance of the Ecclesiastical Courts, so that it leaves it to them who know what is lawful or unlawful by Holy Scripture.

I shall forbear to Answer this until I come to the other Act, where indeed the very same Exception is; (for the words, Gods Law except, in that, is tantamount to these words) and then I will answer both.

The Fourth and last Law is 32 H. 8. cap. 38. on which the Question is, This is *Cardo Questionis*, the mischief before the Statute was, that the Bishop of Rome had entangled and troubled the Kings Jurisdiction, and unquieted his Subjects by his *Usurped Power* in making that unlawful which by Gods Word is lawful in Marriages, &c. Therefore (as the Statute says) it was thought convenient that two things especially for that time should be with diligence provided for.

First. Whereas divers Marriages had been dissolved upon pretence of Precontracts not consummate by Carnal Knowledge, that such Marriages should be good and indissoluble notwithstanding any such Precontract. But this Point is Repealed by 12 Ed. 6. cap. 23.

Secondly;

Secondly, and this concerns the present Case, Whereas also Marriages were often dissolved and brought into great uncertainty, by reason of other Prohibitions than Gods Law admitterh. For the Court of the Bishop of Rome for their lucre invented Dispensations, the Granting whereof they always reserved to themselves, as in Kindred and Affinity between Cousin Germans, and so to fourth and fifth Degrees, &c. which else were lawful, and be not prohibited by Gods Law; and all, because they would get Money by it, &c. It was Enacted, &c. That from the first day, &c. ut supra, it does declare all persons to be lawful to Marry who are not prohibited by Gods Laws. If it had gone no further, or if the following words had not added or given something more, it had been the same with the former Statutes, and liable to the same Objections, and the Temporal Courts would have had no Cognizance of the matter. But the contrary is manifest; for had it been so, the Statute would have been of no use as the time then was: for the Pope or the Popish Clergy must have judged of it, and that they would have done by the Canon Law. For the Decretals (Gratian and Gregories) in which the Sum of the Canon Law consists, (there is some little more, but they are the sum) are nothing but the Determinations of the Pope and his Ministers upon Gods Law.

Now what provision had this been according to the Evil to be remedied? The words of Kindred were as far as the seventh Degree, and so far by the ancient Canon Law was the Prohibition of Marriage; and they grounded themselves upon Levit. 18. ver. 6. None of you shall approach to any that is near of Kin to him, to uncover their Nakedness; and if they had had Words as far as the seventeenth Degree, they might have done the same. But that was Corrected, as I said, by the Council of Lateran: And so it stood with us till this Statute.

Now if this Statute gave no other direction or alteration in this matter, there was no restraint or probability, but that they might and would extend the Prohibition of Marriage as far as the Canon Law. Also, if the meaning of the Statute had been to prohibit in general Marriages against Gods Law, it had been to no purpose to express the Levitical Degrees: for they who are prohibited by the Levitical Degrees are but a part of those who are prohibited by Gods Law, and the general Expression would have served the turn. 'Tis certain, the Statute meant to make all Marriages without the Levitical Degrees lawful, except some few which are excepted here by the words, Gods Law except; and in the former Statute by the words, Or otherwise by the Holy Scripture. For who will say now, taking the Words strainedly and literally, that no Marriage shall be set aside for impotency of Generation, or plurality of Husbands and Wives, or perhaps Adultery?

There

There has been an Opinion in our Books, That if a Woman take two Husbands the Marriage is void, and there needs no separation by Sentence; but if a Man take two Wives there has been some doubt. The first, that of the Woman is clear, the Words Gods Law except, did intend such Marriages; and the same Answer would serve to Answer the same Consequence that would follow out of the words in the former Act, by reason of the words Or otherwise by Holy Scripture. I give this as an Interpretation at present, tho' I shall give a fuller Answer presently.

It was intended that no Marriage, as to Kindred or Affinity, should be set aside, but according to the Levitical Degrees, and that is the scope of the Statute; for it had no aspect to any other sort of Impediment, if it had (as I observed) the General words would have done it more clearly.

But take this Statute in the largest Sense, it has given the Temporal Courts an undoubted Cognizance. Since the making of this Statute there has been no question but that a Prohibition would lye in case of Cousin Germans Marriage, and so on, 2 Inst. 684. This is manifest indeed, because the Statute does expressly declare that such Marriages are lawful and not prohibited by Gods Law: But this our Case is not so clear.

'Tis true, the plain Sense is, that all Marriages are and shall be lawful and good, which are not prohibited by the Levitical or other part of Gods Law, (and this, as other Statutes, the Temporal Courts are Conservators of); the former Statutes were only directed to the Ecclesiastical Courts, viz. That they should Divorce, and not admit of Dispensations, &c.

This being made clear, that the Judges may grant Prohibitions, then the first Question is, Whether any Marriages without the Levitical Degrees be unlawful and impeachable? And for that the Authority is in the Negative, 1 Inst. 235. a. By the Statute of 31 H. 8. cap. 8. 'tis declared, That all persons be lawful; that is, may lawfully marry, that be not prohibited by the Levitical Degrees. But this is not intended to extend to persons which upon other accounts are prohibited by Gods Law to marry, as (at this time Persons precontracted) Persons under a perpetual Impotence, (whereof we have two Instances, Dyer 178. 9. 40.) And the truth is, as my Lord Coke says expressly in 2 Inst. 687. These Marriages (says he) are said to be prohibited by Gods Law, otherwise the Statute of 31 H. 8. would extend unto them.

We come now to this particular Case. Some would have this Marriage prohibited not by Leviticus 18. ver. 14. where the words are, Thou shalt not uncover the Nakedness of thy Fathers Brother: thou shalt not approach to his Wife, she is thine Aunt. But by Levit. 10. ver. 10. where the words are, And if a man shall lye with his Uncles Wife, he hath uncovered his Uncles Nakedness.

But

But certainly this Case is no Prohibition, it serves only to declare the Punishment; for the immediate next words are, They shall dye Childless. This last Text is expressed vice versa in respect to the first; but 'tis the same.

Now the Reason the Judges went upon in this Case, in determining this Marriage to be lawful is, because 'tis neither within an express Prohibition, nor within any Degree there. If we shall admit any thing against this, there is no Repagulum or stay, we shall not know where to rest, but it would go on as far as the Canon Law.

Object. A Great Uncle is an Uncle as well as an Immediate Uncle; and a man is forbid to *uncover his Uncles Nakedness*, Lev. 20. ver. 20.

Ans. There is no such Prohibition, that Expression is but as a Consequent of lying with his Uncles Wife.

But read the words as you will, 'tis plain no other person is meant here, but the Fathers Brothers Wife, even the same as is mentioned Levit 18. ver. 14. and this 20th Verse only meant to declare the punishment.

First, Because there is no other Prohibition in this 20th Chapter, and why should this be taken for one?

Secondly, In the Latin they have distinct words, as Patruus and Avunculus to express Uncles by; but in the Hebrew they say, (for I will not pretend skill in what I have none) they have no such distinct words, nor has the Septuagint any such; the words are, *ὅς ἐν Κοιτῇ μετὰ τῆς συγγενῆς αὐτοῦ καὶ ἀπαγαγούσας, τῆς συγγενῆς αὐτοῦ ἀπαγαγίτω ἀδελφῆς ἀπαγαγούσας.* I have looked upon the last and best, the Paris Edition; the words run thus: Qui cubaverit cum Cognata sua retexit pubertatem Cognatæ suæ: But I rely upon Junius and Tremilius, whose Translation is done with great Care, they have the same words in both places, viz. Nuditatem Patruī; and the whole current of Translations run so. The word Uncle is an Equivocal word; in our * Language (the British Language) a Grandfather, or Great Grandfathers Cousin German is called an Uncle.

* Welsh.

As to the Argument à fortiori, whether or how far Nata is to be received I shall take notice presently.

There is one thing I must observe, (viz.) that Churchmen should not object to us, that this is *Falcem immittere in alienam Messem*; because were it not for the Statute, it would be hard to make out by persons of what Learning soever, that we are obliged to the Levitical Degrees: for we are not bound by the Judicial Law, and how comes this part of it to be distinguished from the rest, I mean those of the Levitical Degrees, which are of the Judicial, positive Law only? for there are some of these Degrees

grees such, as that Marriages within them were prohibited from the beginning of Time: But the Law of the Land, (viz.) 28 H. 8. cap. 7. has declared, That all Marriages within those Degrees are prohibited by the Laws of God; (indeed the Statute in its declaration does include all that is prohibited in Leviticus:) But I must observe too, that the Statute does in this particular declare more and otherwise than is declared in the Scripture; (viz.) the Statute declares generally Marriage with a mans Brothers Wife to be prohibited by Gods Law; but 'tis certain that was not so generally prohibited, for it was with this Circumstance, If the Brother had Issue; for if he had none, the Brother was commanded to take her to Wife and raise up Seed to his Brother, Deut. 25. ver. 5. Matt. 22. ver. 24. Mark 12. ver. 19. Luke 20. ver. 28. But now this is absolutely prohibited by our Law, tho' but qualified by theirs.

Another is said to be prohibited, (viz.) To marry a man's Wives Sister: But that was not so amongst the Jews, where this was the Law of the Forum, the Practical Law; but it was only during her Life, and so is the Text, Lev. 18. ver. 18. Neither shalt thou take a Wife to her Sister to vex her, to uncover her Nakedness, besides the other in her Life time. For Bigamy and Polygamy with Non prohibited Persons were allowed there.

So that these things are not so truly of Ecclesiastical Cognizance, because there are things declared to be prohibited here, which are not by Gods Law (otherwise.) Now to consider how this Law in Leviticus shall be extended and expounded, the clearest way how to understand any Law is by what was the Story and Judgment of those People, and the Times in which it was practical. To examine this Law by the Civil Law or Canon Law, is as wide and as bad as to examine it by the Indian Law, or Persian Law; therefore the Judges have considered what was the Opinion and Judgment of the Jews; (this I observe to shew the Care of the Judges) and especially they have consulted Mr. Selden's *Uxor Hebraica*, the six first Chapters; there it appears that the Scribes and Pharisees interpreted this Law Literally; but the Prudentes and the Sanhedrim did make other Prohibitions, tanquam sepimenta Legis: But this Degree in this Case is not even amongst those. Then there were others, the Karmires, who held that these Degrees were mentioned only for Instance, and that several others are within the Prohibition paritate rationis; and what they say (save in two or three particulars) is the same with our Parochial Tables, and probably at the first this Table came thence from that Example into the Christian Churches. Now the first is of incomparable Authority above the latter, for they had Moses's Authority, Matt. 23. ver. 23. but the others were a Sect.

It was agreed, as I said, that Marriages in the ascending and descending Line, i.e. of Children, with their Father, Grandfather, their Mother, Grandmother, and so upwards, are prohibited without limit: But the prohibition of Marriage, which is in question here, (viz.) with an Uncles Relict, is not to be extended beyond the Degree which is expressed. The Reason of the difference between these, I will shew

First, The Reason of the Prohibition to marry a mans Parent is, because they are the Cause of his Being; the Father and Mother indeed are the immediate Cause, but the Grandfather and Grandmother, &c. are the Cause too tho' mediate; he could not be that which he is without them, and if he be obliged to the one, he is to the other: But a man is no more obliged to his Uncle for his Being, than if the Uncle had never been. The Reason why a man is prohibited to marry his Uncle's Wife is, because 'tis expressly named.

Secondly, Another Reason of the Prohibition in the first Case is, That such a Marriage is against Nature; but not as 'tis commonly taken. For as we commonly talk of the Law of Nature, it is *Pons stultorum*, when fools can't tell which way to go further they go there; for by Nature 'tis not possible for a Child to know his Parent (he comes to that knowledge by Laws and Reputation, and therefore the Theban Story might well be true, (viz.) That Oedipus being bred from his Parents, might unwittingly kill his Father Laius and marry his Mother Jocasta. He is a wise Son that knows his Father, our Proverb says: So neither can the Father know his Son, tho' the Mother may, (at least better than the Father); but with another thing supposed, 'tis naturally unlawful, one (that knows his Relation) ought not to marry his Parent or Child, it is against Nature. There is neither Servant or Master in Nature, but those Obligations are induced thereupon by Contract, &c. But supposing a man cannot be Master and Servant to the same person at the same time, because there is a repugnancy in it; so a man cannot be Child and Husband, &c. because there is a repugnancy in the Offices. A Parent cannot obey a Child, and therefore 'tis unnatural a Parent should be Wife to a Child. A Parent, as a Parent, may Command and Correct a Child, and there there a Child, as Husband, should Command and Correct the same Parent, is utterly repugnant.

Under the Law the Son that Cursed his Father or Mother, Levit. 20. ver. 9. and also he that was Disobedient to either of them, Deut. 21. ver. 18, 19, 20, 21. was to be put to death. And as there is a Reverence and Obedience due to the Immediate Parents, so there is to Grand Parents; if the Immediate Parent have an absolute or qualified Power over the Son, the Grand Parent

Parent has the like over the Son too; because the Grand Parent hath it over the Immediate Parent.

Now I will cite a Case in our Law somewhat to the purpose I have been speaking, 'tis in Platt's Case, Pl. Com. 37. a. If a Woman be Warden of the Fleet, and one that is in Prison there marry her, he is thereby out of Prison, and the Law does adjudge him to be Enlarged; because 'tis repugnant that he as Husband should have the Custody of her, and she as Gaoler the Custody of him. And the like Reason, at least in some degree, is against Parents marrying their Daughters, &c.

And now as to all this, I will cite one of the greatest Human Authorities. It is the Opinion of Hugo Grotius, the Learnedest man of his time, De jure Belli ac Pacis, lib. 2. cap. 5, & 12. Ab hac generalitate (says he) eximo matrimonia parentum cujuscunque gradus cum liberis, quæ quo minus licita sunt rati (ni fallor) satis apparet; nam nec maritus qui superior est lege matrimonii eam reverentiam potest præstari matri quam natura exigit, nec patri filia; quia quamquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem quæ illius necessitudinis reverentiam excludit. The Reverence on each side is inconsistent. But this Reason holds not against the marriage of a man's Uncles Wife; and the same very Great Person gives his Opinion to this purpose a little before; De conjugii eorum qui sanguine aut affinitate junguntur satis gravis est quaestio, & non raro magnis motibus agitata; nam causas certas ac naturales cur talia conjugia, ita ut legibus aut moribus vetantur illicita sint, assignare qui voluerit, experiendo discet, quam id sit difficile, imo præstari non possit.

Thirdly, Another Reason of the Unlawfulness of Prohibition of Marriages of the first kind (which holds not in this Case) is the inconsistency, absurdity and monstrousness of the Relations to be begotten by them, the Son would be his Fathers Brother, his Mothers Grandson, his own Uncle, &c.

Object. In the Civil Law Uncles are *Loco Parentum*?

Ans. They were so estimated there; but thence it doth not follow that they are so. But I will give the true Reason why they were so called, (viz.) They, the agnati, are legitimi Tutores of the Brothers Children; and this appears by Justinian: But how absurd is it to apply this to this Matter? Why, by the same Reason the Guardian in our Law can't marry his Ward, let the Degree be what it will.

Object. The Canon Law does prohibit the same also, because they are *Loco Parentum*?

Ans. The Reason is borrowed from the Civil Law; and must have the same Answer. There is another thing very remarkable as to this distinction, (viz.) that our Law puts a great difference between Parents and Uncles; the Father can't inherit the Son;

but the Uncle may. So that the measure to be taken by and from the Laws of one Kingdom to another, is quite different.

In the Synod held by the Province of Canterbury, Anno 1603. there were certain Canons made: The Synod was called by the Kings Writ, and the Canons ratified as they ought to be. In the 99th Canon of those it is Ordained, "That no person shall marry within any Degrees expressed in the Table there mentioned. This Table was first set up after this Canon; but it had been published by Proclamation, &c. in the Queens time. This Canon is so penned that it must be understood, that all the Degrees are expressed there within which Marriage was intended to be prohibited; but now there is no such Degree as this in the present Case there. I do not take the Pleading in this Case to be good; because here it is not said, she was Carnally known, as before I observed it ought to be, to bring him within the Statute, then there is a fault in the Plaintiffs; for tho' they have set down the Case so that we can see what it is, yet they ought to have averred that it was not within the Levitical Degrees; because that then they might have given opportunity to the Defendant to assign some other Cause, Bene & verum est, &c. but she had married a former Husband before, &c.

Now I come to the other sort of Objections, which I promised to give some Reasons in answer of, for the satisfaction of of People abroad.

I did say, That it were very difficult, without this Statute, to make it out, that we were bound to observe this part of the Judaical Law: And we are not bound to observe any part of the Judaical Law, (except those particulars where there is a Natural Reason too.) Acts Apost. 15. There is the account of a Council held concerning the keeping of the Mosaiical Law, and the result is, That it seems good to the Holy Ghost and the Apostles, to lay upon their Brethren (which were of the Gentiles in Antioch, &c.) no greater burthen than these necessary things, That they abstained from Meats offered to Idols. Blood, things strangled, and Fornication. A man can't say that all these were Mosaiical neither; but it is plain these were all they would lay upon them and the Corinthians. 'Tis clear, they were not given as Precepts, but Counsels, that the Communion between the two Churches which were then coming together might not be interrupted, Cor. 10. ver. 17, &c. Whatsoever is set before you eat, asking no Question for Conscience sake: But if any man say unto you, This is offered in sacrifice unto Idols, eat not for his sake that shew'd it, and for Conscience sake, &c. Conscience I say, not thine own, but the others, &c. Give none offence, neither to the Jews, &c. Rom. 2. ver. 14. does clearly affirm, that the Law of Moses was not given to the Gentiles. And
Rom. 3.

Rom. 3. v. 2. Shows that this Law called there the Oracle of God, was committed to the Jews only.

Object. (And this is the great Objection against our Prohibitions) This Law depends upon the Original Tongues and Tradition and History ; and Laymen cannot know the Secret of this Law by which this matter is to be decided.

Answ. This Objection hath some speciousness in it, but no weight.

First, The Law, viz. the Levitical Law is generally understood, to be that which is publickly received as the Translation ; all Laws that are made concerning any such thing, are to be understood of that kind of the thing which is vulgarly and generally known and received.

Secondly, And 'tis not long since the Clergy came to be so learned, they were content heretofore with the Vulgar Translation ; and 'tis not necessary for a Dean (for that purpose) or other Dignitary or Clergyman, quasi such, that he should understand the Languages. But,

Thirdly, We have no Cognizance of this Matter ; there was a time when they had no cognizance of Wills and Testaments (but now they have, they must study them, and determine concerning them.) Since we have a Cognizance, we may as well prohibit in this Case of Land Freehold, &c. for since this is made of the same nature, we must go the same way : If an Act were made, that in matter of Theft, &c. we should judge after the Law of Moses, we must study it, and judge by it. 'Tis no new thing that Laws be thus transferred from one Nation to another ; thus was the Law of the Twelve Tables from Athens to Rome ; thus the Law of Rhodes to other parts of the World, and so our Law was made the Law of Ireland ; and this is the Answer I give to the two Statutes, that since we have Cognizance we must take notice of Gods Law. If Churchmen in this case encroach Jurisdiction, they must be prohibited, because they have no Cognizance, and we have, tho' their accidental Learning may be more than ours.

Object. 'Tis hard that this should be a Prohibiting Law any more than those two other Statutes, which 'tis agreed were directive only (to the Spiritual Courts) and gave the Temporal Courts no Jurisdiction.

Answ. There is a full and flat answer to this ; this Statute makes it not at all cognisable by them, for where any Court has Cognizance the party must have Process, &c. But now here in the close of this Statute, 'tis enacted, That no Person, &c. shall be admitted to any of the Spiritual Courts, &c. to any Process, Plea or Allegation contrary to this foresaid Act : And therefore all Cognizance of that nature is taken away from them.

them. They have Cognizance of all Marriages within the Levitical Degrees (we allow and agree) to disturb and punish the Parties ; but they have no Cognizance nor Power to determine what is within the Levitical Degrees, and what not.

I conclude, It is the Opinion of this Court and of all the Judges, that the Prohibition do stand, and no Consultation be granted.

In this Case Dr. Stern the Archbishop of York was very zealous and industrious to set aside the Prohibition. He made several and distinct applications to the Judges about it ; he earnestly and particularly debated the matter with them, and gave them Papers of his Arguments and Reasons to prove this Marriage incestuous and unlawful.

Thomas Rudyards Case.

Thomas Rudyard, an Attorney of this Court, came into this Court upon the return of an Habeas Corpus directed to the Keeper of Newgate, who returned, that he was taken and detained by virtue of a Warrant to him directed from Sir Samuel Sterling Lord Mayor, and Sir J. Robinson, two of the Kings Justices of the Peace, the tenour of which Warrant follows in these words. Whereas T. R. Gent. hath been brought before Us, and examined touching several Misdemeanours by him committed within the City of London since the Month of April and before the 4th of this instant June, and to Us complained of, and more particularly for inciting and stirring up of His Majesties Subjects, then and there, to the disobedience of his Laws, and for abetting and encouraging of such as do meet in unlawful and seditious Conventicles, contrary to the form of the late Statute made in the 22th Year of our Sovereign Lord the King that now is ; upon whose Examination we find just cause to suspect him to be guilty of the said Misdemeanours, and thereupon did require him to find Sureties to be of the good Behaviour, which he refused ; These are therefore to require you to take into your Custody the Body of the said T. R. and him safely to keep till he be from thence delivered by due Course of Law, Given under our Hands and Seals this 11th day of June 1670.

The Return being filed and spoken to by the Counsel upon two several days, the Court delivered their Opinion Seriatim.

Wyld held that he ought to be remanded, for if the Warrant had been that he appeared to be guilty, or that they had found him guilty ; then the Commitment had been good, as hath been agreed on all Hands, and here the words in a favourable construction amount to as much. The proceedings of the Magistrates against such Seditious Persons are to be encouraged, especially in such a time as this, when 'tis known they are grown to such a head.

Archer,

Archer, contra, for 'tis altogether uncertain; 'tis said he was complained of, &c. but not that he did any thing, and that they find just cause to suspect, but shew not the Cause in particular: If it had been said sundry Misemeanours, and not expressed what, all would agree it insufficient, as Chambers Case, 1 Cro. and Wolnoths Case, *ibid.* Mr. Selden, 3 Car. was required to find Sureties for the good Behaviour, for which the Judges were severely reprehended in full Parliament because no sufficient Cause appeared: Tho' the Justices here had sufficient Cause to induce their suspicion, they ought upon the Return to have signified it to the Court for their satisfaction also; it should have been expressed also in what sum they required him to find Sureties, that it might have appeared to be reasonable, so that we cannot remand him; but I think 'tis fit to oblige him to Bail to appear the first day of the next Term, that he may answer such things as shall be objected against him.

Tyrell, It is the Statute of 34 E. 3. c. 1. that enables Justices of the Peace to require Sureties for the good Behaviour, and that upon Suspicion, and seems to refer it to their Discretion, but that must be exercised according to Law, and whether it be or no, the Judges in this Hall must judge, and therefore the matters ought to be certainly certified to them. The present Return is altogether uncertain, wherefore I think it ought to be discharged, but I would advise him to consider the Statute of 35 Eliz. c. 1. against impugnors of the Kings Authority in Ecclesiastical Causes.

Vaughan, Chief Justice, This Case is one of the nicest that ever I met with; on the one side is the consideration of discouraging Sectaries, and preserving of the Publick Peace and Quiet of the Government. On the other side the Legal Right which every one hath to his Liberty. Whoever excites the People to the disobedience of a Law, commits the Highest Offence under High Treason. I do not mean every Law, as if one which should cause a Treason to be done, should be so guilty, but Laws which are of a publick Nature.

As to the Return I think it is the most insufficient I ever yet saw. The certainty of the sum ought to have been expressed in which he and his Sureties should have been bound; for otherwise the sum required might be so great that any Person might be constrained to remain in Prison. There may may be lawful inciting to the breach of the Law, as a Counsel or Attorney advising an Action which is not maintainable, and sometimes it may be upon some particular design, as in Dier 168. Bronker being made Sheriff, one Hyde dissuaded him from taking the Sheriffs Oath, because of the difficulty of the Articles. B. was condemned in 100 l. fine and 5 weeks imprisonment

ment for refusing of the Oath, and H. in 20 l. and 5 weeks imprisonment for inciting him to it; and the reason was because Hyde knew it to be an Offence, and that makes it differ from the case of a Counsel or Attorney; but the Offence was the less, because the incitement was upon a particular reason, and not against the Law, quatenus a Law. In the Retoyn here they don't say that they found he was guilty, but only that they found cause to suspect him. Now what Remedy can be had in such a Case, can an Issue be taken whether they had cause to suspect him or no? But the case, one who had been fined 10 l. for an Offence against this Act (in which case the Statute allows of an Appeal) had come to Mr. Rudyard to know what he should do, and he had advised him to bring an Appeal at the Quarter Sessions, this is no Offence and yet 'tis an abetting to such as meet, and perhaps might be a cause of suspicion to a Justice of Peace: I do not see that the Retoyn is good in any part of it, and therefore he ought to be discharged; but I think the Justices should do well if they know him to be guilty, to commit him by a better Warrant; whereupon the Prisoner was discharged: For it is the usage of this Court when the Judges are of three Opinions, (as here my Lord Chief Justice and Tyrrell for discharging him, Archer for putting him to Bail and Wyld for remanding him) to give the Rule according to the Opinion of the Two which agree.

The Court said they had often directed, that no Habeas Corpus should be moved for in this Court except it concerned a Civil Cause, because when the Party was brought in and the Cause shewn, this Court cannot proceed upon it, therefore the proper place to move for them is the Kings Bench; but they permitted it in this Case, because the Party was an Attorney of the Court.

The Court demanded of Rudyard upon his first bringing in, whether he would submit to what they should propose and direct, he said he would submit to the Rule of the Court; but the Court told him that he must do; but demanded whether he would yield to what they should do by way of Arbitration; but he (tho' advised otherwise by his own Counsel) discovered his unwillingness to submit to any thing but the Rule of Law.

Termo

Termino Sancti Michaelis, Anno 23 Car. II.

In Communi Banco.

Methuselah Turner *versus* Sir Samuel Sterling.

Pas' 23 Rot' 363.

In an Action upon the Case brought by the Plaintiff against the Defendant; the Plaintiff declares That *London* is an Ancient City, and that there is an Ancient Bridge; and that there use to be two Officers for it to look after it called Bridgemaisters, and that they have certain Fees and Profits belonging to them. And that there is a Custom for the Citizens assembled in a Common Hall or Court, yearly to choose or continue those Bridgemaisters. And another Custom, that if one of these die within the Year, that the Mayor shall assemble a Common Hall, and they being Congregated, shall proceed to the election of another Bridgemaister in his stead for the residue of the year. And another Custom, that upon their proceeding to Election, if there be two Persons upon Election, he that is chosen by the major number of Votes is duly Elected; and that if one in such case require that the Polls should be numbred, that the Mayor ought to allow the Poll, and that the Assembly ought to be dismissed till that were done, And another Custom, that the Party so chosen, ought to be sworn, and used to receive the Profits to his own Use. That 24 June 22. *nunc Regis* there was a Common Hall assembled, the Defendant being then Mayor, and that A. and B. were then and there chosen to this Office, &c. and being so, A. died in *October* following; and on the 18th of the same *October* there was another Common Hall for the Election of a Bridgemaister in his stead, congregated by the Defendant, and then and there the Plaintiff and one *Allen* stood as Competitors to be chosen for that Office, and the Question grew which had the greatest number of Electors, and the Plaintiff avers that he had the greatest Number, and the other denied it, and he requested that according to the Custom they might go to the Poll; and the Defendant not minding the execution of his Office, but violating the Law and Custom of the City, did then and there maliciously refuse the numbring the of Polls, and made Proclamation, That the Congregation of Electors should depart, and discharged the Court, and the other man was sworn, and so he lost the Profits of the Place, &c.

Upon Not Guilty pleaded, and a Verdict for the Plaintiff, after it had been several times spoken to in Arrest of Judgment, the Court delibered their Opinions seriatim.

Wyld. I think the Action well lies, for otherwise it will be in the power of every Head Officer to get whom he will have chosen or refused.

It is objected, That *non constat* whether the Plaintiff should have been chosen.

Answer, The Law gives an Action for but a possibility of Damage, as an Action lies for calling an Heir Apparent, Bastard.

It was objected also, That at the Common Law there was no Action for a Parliament man against a Sheriff for not returning of him being Elected.

I Answer, That is a place of Burthen, this of Profit; if I have an Horse or Beast-Market, and a Toll for Sale, and one hinder the Beasts from coming hither, *non constat* whether they should be sold. Yet for the possibility of that, and of the loss of the Toll thereon, an Action lies, 41 E. 3. 24. Pl. 17. b. An Action of the Case was brought against a Sheriff for making of a Precept to one to make a Return in the Plaintiffs Case, who indeed was not a Bailiff of a Franchise, and thereupon the Return was quashed, Br'rie Act' Case, 120. Ho 9 H. 6. 60. Action against an Elcheator, who had taken an Office, whereby the Party was found to hold of J. S. and he returned one whereby he was said to hold the Holety in Capite. Where an Officer does any thing against the Duty of his Place and Office, and a Damage thereby accrues to the Party, an Action lies: 'Tis positively affirmed here, he had the greater Number.

Archer of the same Opinion. This is a wilful denial of the duty of the Defendants Place, and for the particular Damage an Action lies. 'Twas said there might be many Competitors, and all might bring Actions. No, for 'tis averred that the Plaintiff had the greatest Number. An Action lies against an Arch-Deacon for not inducing, F. N. B. 94. So if a Sheriff will not execute a Writ of Seisin, an Action lies against him. An Action lies against an Ordinary for admitting a wrong Patrons Clerk against a Verdict in a *jure patronatus*, Hob. 318. I agree to the Case put at the Bar, that upon a Writ de Coronatore eligendo, if the Sheriff will not return him Coroner, who was chosen by the major part, an Action upon the Case lies, tho' I know no Authority for it in point, Vid. 6 E. 4. 9. b. Pl. 21. A man that has a Title to an Office, before he has possession, shall have an Action upon the Case after an Assize, 21 E. 4. 23. Is as memorable a Case for the purpose as any I know, there Fairfax gives good advice to Pleaders to mind Actions upon the Case; and then he said the use of the Subpoena would not be

be so frequent, Hob. 105. Action for suing double Execution. I think Actions upon the Case should be according to Justice Fairfax's his advice favoured in Courts of Justice.

Tyrell. Perhaps there never was such an Action, which is an Argument against it, Litt. 107. but I think it lies. Action lies not against a Lord for not admitting a Copy-holder, nor against Feoffees in trust for refusing to make a Feoffment, or a Tenant for refusing to Attorn, or against a Feoffee for refusing to make Liberty according to the Charter; but it lies against an Officer or against a Clerk for refusing to enroll: This Action is for Damages for being prevented of having the Office, and not for the Office it self. The Cases of the Copy-holders, &c. are not to be compared to this, for there are proper Remedies for them, as Subpoena's, and other Writs at the Common Law, but here is none. De cetero non recedunt Partes a Curia nostra sine Remedio, ne Curia deficiet in Justicia exhibenda says the Statute. And my Lord Coke says 'tis a Maxim in Law, that no Action lies for the Ward against the Lord which disparages him, but the next of Kin may enter. Co. Lk. 107. An Action lies as much for injurious preventing him of having the Office, as for hindring in or him the executing of it after that he is in. For Actions of the Case are not of any certain Form, but vary according to the Circumstances.

It was objected, That every Action upon the Case supposes *damnum & injuriam*; now here was no Election, 'tis impossible to know whether he should be an Officer.

Ans. The Custom is alledged positive, that he which hath the greater Number is elected *ipso facto*; again, *qui destruit medium destruit finem*, 'tis as bad as if he had turned him out of his Office: It may be tried whether he were duly elected, and 'tis in effect tried here; there cannot be multiplicity of Actions brought, by this the Mayor will make himself sole Judge and Arbitrator, and dispose of Elections which should be Popular and as my Brother hath said, an Action of the Case lies for a possibility of Damage.

Vaughan, Chief Justice, contra. That wherein I am satisfied is, that no Damage appears; suppose none had been elected, he should not have an Action more than any person in the Town: If a Mayor will not elect a Burgess, or a Sheriff a Knight, no Action lies, because there is no Election. If an Officer will not elect at all, 'tis against his Duty, and so 'tis if he do it unduly; but he is punishable in a publick way by Information, or it may be by Indictment: If 20 had stood, must each have recovered the value of the Place?

Object. But there is an Averment that he was chosen by the greater Number.

Answ. That can't be put in Issue, or known or tried; suppose the Election were by Ballots, &c. should he have an Action for not opening the Box. In the Case of the Cozoner there is apparent Damage, and 'tis against the Statute; and in the Case of Induction there is a certain loss. I take it that 'tis not Actionable to call a man Bastard, while his Father is alive, the Books are cross in it: nay, if Land had Descended, I doubt it without a Special Damage, no more than to say one had no Title to his Land. The Case of the Market is close, but there the Person damnified is certain, and the thing leads to deprive him of the benefit of the Kings Grant. But my Brothers have given the Rule, take Judgment.

King of Grayes Inn *versus* Sir Edward Lake.

Action for that whereas he was bred up to the Law and practised it, and had many Persons of Honour and others his Clients, and thereby got Money and maintained his family, &c. The Defendant, false & malicious wrote a Letter to Ann Countess of Lincoln, who was the Plaintiffs Client, containing that the Plaintiff would give veracious and ill Counsel, and stir up a Suit, and that he would milk her Purse and fill his own large Pockets, &c. per quod he lost the said Countess and other Clients. Upon not Guilty pleaded and a Verdict for the Plaintiff. It being moved in Arrest of Judgment, Wyld, Archer and Tyrrell held that the Action lay; 'tis a Scandalous Letter concerning his Profession, and here is a Special Damage: He does give bad Counsel, spoken of a Lawyer, judged Actionable; so Dunce stirring up Suits is taken in malam partem.

Vaughan Chief Justice, I must submit to the Rule given, but am of another Opinion. In ancient Books we do not read of an Action for Words, unless the Slander concerned Life. 'Twas held not actionable to call Villain, unless 'twere added he was laid in wait to be seized; the growth of these Actions will spoil all communications; a man shall not say such an Inn, or such Wine is not good. Their progress extends to all Professions, to say a man was not a good Surveyor has been held actionable. The words spoken here have no more relation to the Plaintiffs Profession, than to say of a Lawyer he hath a Red Nose, or but a little Head; to say one had the use of a Womans Body, is a slander, it being an Ideom of speech for lying with her. But,

Obj^t. All these words together make a Slander.

Answ. No man can assign me such a ratiocination, a male divisad bene conjuncta: I never heard it but in my Lord Straffords Case, viz. that many Trespasses should make a Treason. 'Tis said he stirred up a Veracious Action, so does a Counsell when

when he Advises an Unsuccessful Action; for the party is amerced pro falso clamore. He will milk your Purse, taken enunciatively signifies no more than Milking a Bull, the Phrase is not come to an Idiom. So of Filling his Pockets; these Words might have been spoken of the Law, and indeed they are spoken of the Thing, not the Man of his Practice: Dunces, Corrupt, &c. concern the Profession; but these words are applicable to any. If he had said, he were not a Good Fidler; would that be Actionable?

Termino Paschæ, Anno 28 Car. II.

In Communi Banco.

Hockett & Uxor *versus* Stegald, & Ux.

Trespas for Assault, Battery, and Wounding of the Baron and Feme.

Upon Not Guilty pleaded, the Verdict was as to the Wife Guilty, and quoad residuum Not guilty.

It was moved in Arrest of Judgment, that the Baron and Feme could not join in an Action of Trespas for Beating them both, 2 Cro. 355, 655.

1. That there is nothing found as to the Beating of the Husband, and so an imperfect Verdict; for the Quoad residuum shall extend only to the other Trespases done to the Wife, Yelv. 106. Vid. Lib. which goes to both Points.

But the Whole Court were of Opinion, that the Verdict had Cured this Mistake in the Action, 9 Ed. 4. 51. 6 Acc. Vid. Styles 349.

Termino

Termino Pasche, Anno 29 Car. II.

In Communi Banco.

Herbert Perrot's Case.

HE having married a Wife that had an Inheritance of a considerable Value, prevails upon her (while she was but of the Age of 20 years) to levy a Fine upon which the Use was declared to him and her, and the Heirs of their two Bodies. This was taken in the Country upon a Dedimus potestatem by Sir Herbert Perrot's Father and Mother. After which the Wife died without Issue; but had Issue at the time of the Fine,

It was moved in Court, that this Fine might be set aside and a Fine imposed upon the Commissioners, for the undue Practice and taking of a Fine of one under Age. But all the Judges agreed, they could not meddle with the Fine; but if the Wife had been alive and still under Age, they might bring her in by Habeas Corpus and inspect her, and set aside the Fine upon a Motion; for perhaps the Husband would not suffer the bringing or proceeding in a Writ of Error.

And Justice Atkyns said, These Fines (which are so frequent in taking Fines) were occasioned by the Alteration of the Common Law, made by the Statute of Carlisle 13 Ed. 2. that Fines which before were always to be done in Court, may now be taken by Dedimus: But the Common Law falls much short of the Spirit the Statute prescribes, which requires that two Judges of the Court, or one at the least, should (taking with him an Abbot, Prior or Knight of good fame) take such Fines; whereas 'tis now the Common Practice to name Attorneys and Inconsiderable persons.

The Court were of Opinion, That if a Commissioner to take a Fine do execute it corruptly, he may be fined by the Court; for in relation to the Fine (which is the proper Business of this Court) he is subject to the Censures of it, as Attorneys, &c. But they held, that they had no power to fine the Parties for a Misdemeanour in them.

North Chief Justice and Wyndham, would have fined Sir Herbert Perrot for taking a Fine of one under Age: But Atkyns and Scroggs dissented, because it did not appear that Sir Herbert Perrot did know she was under Age, and it could not be discerned by the Wife, she being Twenty.

Termino

Termino Sancti Hillarij, Anno 29 & 30 Car. II.

In Communi Banco.

Sir John Otwaie's Case.

In an Ejectment, upon a Special Verdict the Case was to this effect:

It was found that there was a Parish of Ribton and Vill of Ribton; but not Coextensive with the Parish. J. S. had Land in Tail in the Parish and out of the Vill, and bargained and sold by Indenture, with a Covenant to levy a Fine and suffer a Recovery to the Uses of the Deed of the said Land in the Parish of Ribton; and the Fine and Recovery were only of Lands in Ribton, and whether this would serve for the said Land in the Parish of Ribton was the Question?

Serjeant Maynard Argued, that it would not; and said, that the Division by Parishes is wholly Ecclesiastical, the Limits of which are equal to the Cure of the Parson: But that of Towns and Villages is Civil, and hath the same Limits with the Power of the Constable and Tythingman. Where a Place is named in a Record of the Law, and no more said, 'tis always intended a Vill; tho' when a Vill and Parish are both mentioned, and of the same Name, they are intended Coextensive. The later Authorities have admitted Fines to be levied of Land in a place known, 1 Cro. 2 Ro. 10. But in a Recovery the Town must be mentioned.

But 'tis Objected, That here the Intention appears by the Deed, that these Lands should pass?

But he Answered, That cannot carry the Words further than they are contained in the Record.

Again, it is Objected, That the Deed, Fine and Recovery, do all make but one Assurance?

True, but each hath its several effect; the Deed serves to declare the Uses, but it cannot make the Record larger than it is in the Subject Matter of it. If a Formedon had been brought, and the Fine and Recovery pleaded in Bar, had it not been a good Reply to have said, Nient comprise, &c. ? In 2 Cro. 120. Storke and Fox, the Case was, Walton and Street were two Villages in the Parish of Street, and a Fine was of Lands in Street; and Resolved, that no Lands, but in the Vill of Street (tho' in the Parish) did pass. And so is Mo. 910. in case of a Grant, 2 Ro. 54. If this were permitted it would introduce much Mischiefe; for

men

men would not know what passed by searching the Record; but this should be known only by a Pocket Deed, and so they in Reversion, a Lord of Ancient Demesne, &c. would not know when to make their Claim, and should be barred by reason of a Private Deed, when the Record of the Fine or Recovery did not import that they were concerned. Fines are to end Controversies, and therefore must be certain, and in that respect sometimes receive a stricter Construction than Grants. A Fine of a Tenement is not good, but ought to be reversed; but a Grant of a Tenement will bind.

On the other side it was Argued, that since Common Recoveries have been so much in practice, and become the Common Assurances of mens Estates, they have been favourably Construed. A *Warrant* in Reputation hath passed by the name of a *Warrant* in a Recovery. Sir M. Finch's Case in Co. and in 5 Co. Dormer's Case, Common Recoveries have been admitted of an Advowson. All here is to be taken as one Conveyance: A Deed expressing the intent may abridge the Recovery in the number of Acres, 2 Co. 76. 'Tis true in case of the King, as that in Mo. 710. there shall be no larger Construction than the express Words import. So where the Intent appears, as that in Dyer 261. B.

North Chief Justice, Wyndham and Atkyns (Scroggs absent, but said by the Chief Justice to be agreed) were of the same Opinion, and that Common Recoveries were not to be overthrown by nice Constructions, and that the Inconvenience objected against the Intent being explained by a Pocket Conveyance, was the same where a man had several Lands in the same Vill; that of late they have directed the Curfitors to make out Writs of Lands in Parochia. They said, that there was no Case express against this, and that it was the stronger because found in the Verdict, that he which suffered the Recovery had no Lands in the Vill, and therefore must be void if not extended to the Parish.

Termino *Pasche*, Anno 32 *Car. II.*

In Communi Banco.

The Case of *Dodwell* and the University of *Oxford*.

A Prohibition was prayed to the Chancellors Court of the University of Oxford in the behalf of *Dodwell*, who being a Townsman of Oxford, was Libelled against in the said Court upon a Statute of By Law of the University made in King James's time, that whoever Privilegiatus sine non privilegiatus should be taken walking in the Streets at Nine of the Clock at Night, or after, having no reasonable Excuse to be allowed by the Proctor, &c. should forfeit 40 s. &c. whereof one Moiety was to go to the University, and the other to the Proctor, &c. that should take him: And that *Dodwell* was taken walking abroad at that Hour, and being demanded a Reason thereof, he refused to give any Account; & causa contemptus & ad morum reformationem this Libel was Exhibited.

The Prohibition was moved for the last Term; but in regard the Court observed it touched the Jurisdiction of the University on the one hand, and concerned the Liberties and Rights of the Townsman on the other hand, they deferred the granting of it until they should hear Counsel on both Sides, which was appointed this Term. And now sundry ancient Charters were shewn, by which was granted to the University a Jurisdiction tam in Laicos, quam in alios, and a By-Law made above 200 years since against Night-walking, with the penalty of 40 s. upon the Offender, and Presidents of Proceeding thereupon in the Chancellors Court; and that they were as well Guardians of the Peace by Prescription, as by Charter. And an Act of Parliament of 13 Eliz. was shewn, whereby their Jurisdictions, and Priviledges, and Statutes, were Confirmed. And altho' the Mayor hath also a Commission of the Peace, yet 'tis subordinate, and he swears Fealty to the Chancellor.

Curia. This Libel is grounded upon a By-Law of 7 Jac. and being subsequent to that Statute of 13 Regine it is questionable whether warranted by it, or no? This By-Law and Proceeding cannot be grounded nor derive Authority from their being Guardians of the Peace by Prescription, as it seems they are by 9 H 6. 44. For without Act of Parliament, or express Prescription, a Corporation cannot make a By Law to bind those which are not of the Body. Justices of the Peace cannot obtain a Penalty for a Crime without their Jurisdiction and the Proceeding in the Chancellors Court, which

is according to the Civil Law, cannot be warranted by the Kings Charter. For no Court, other than such as proceed according to Law, can be, unless by Prescription or Act of Parliament; wherefore in regard if the University should Intitle themselves to this Jurisdiction by Prescription, it were properly triable by a Jury. And if upon the Act of 13 Eliz. Matter of Law might arise how far the Act might extend.

North Chief Justice, Atkyns and Scroggs, thought it was not fit they should determine those Questions upon a Motion, but inclined to grant the Prohibition, and propounded to the parties to agree that the Libel should be amended, wherein it was grounded upon the By-Law made 7 Jacobi, which being subsequent to the Act of 13 Eliz. the Merits of the Cause would not be brought before themselves to determine the Grand Points, which was agreed.

And then the Court said, that they would grant a Prohibition, and let the other Plead, &c. For North said, that they did often deny a Prohibition, tho' it were a *Writ ex debito Justitiæ*, where they saw no Colour for it: But if any material Questions were like to arise, it was proper to grant it, and not to determine them upon Motion, but upon pleading to the Prohibition, and therein it differed from a Habeas Corpus, which was to be instantly granted, because the party is in Prison; but there is no such speed requisite in a Prohibition.

But Wyndham was against the Prohibition in the Case at Bar; for he took it that the By-Law (7 Jac.) was but in Confirmation of that made before, and as a Renewing of it, which he took to be confirmed by the Act of 13 Eliz.

Nora, Scroggs said, that Nine of the Clock could not be held such an Hour, as it should be a Crime for a Townsman to walk at no more than Three in the Afternoon. Tho' for Scholars it might be reasonable to restrain them; but no Reason that Townsmen should be subjected to such Rules as were proper for Scholars. And upon this he much grounded his Opinion for the Prohibition.

Anonymus.

Anonymus.

In an Action of Trespas the Defendant pleaded, That the Plaintiff was Impropiator of such a Rectory, and that he was sued in the Ecclesiastical Court, and by Sentence there the Profits were sequestred for the Repair of the Chancel. To which the Plaintiff demurred, supposing that by 31 H. 8. the Profits of Rectories Improprate were made Lay Fee, and so not subject to be sequestred by the Court Christian; and therefore it was supposed that the Lay Impropiator could not sue for Tythes in the Spiritual Court. For which Cause 32 H. 3. was made to empower Laymen to recover them; and 35 H. 8. gives the Ordinary Remedy for Procurations and Synodals, which was conceived had been lost by making the Rectories Lay Fee. 2 Cro. 518. in Parry and Banks's Case it is Resolved, that when the Rectory is in the hands of a Lay Impropiator, the Ordinary cannot dissolve the Vicaridge, nor in such case cannot augment the Vicaridge, 2 Roll. 339.

The Form of Pleading was also Objected unto: As,

First, 'Tis not positively alledged, that the Chancel was out of Repair; but that he was Labelled against, which Label did mention only it to be out of Repair.

Secondly, The whole is Sequestred, whereas it ought to have been but in proportion to the Charge of Repairing, and should be certainly expressed what it required.

Thirdly, The Sequestration is to remain by the Sentence until the Judge should take further Order. Whereas it ought to have been, but until the Repairs had been done.

These Exceptions the Court held fatal, and therefore gave no Opinion as to the Matter in Law, but did incline that there could be no Sequestration; for being made Lay Fee, the Impropiation was out of their Jurisdiction, and it was now only against the Person as against a Layman, for not Repairing the Church. And they said in case of Dilapidations the whole ought not to be Sequestred, but to leave a proportion to the Parson for his Livelihood.

Anonymus.

In an Ejectment upon a Special Verdict the sole Point was, Whether a Lease for a year, upon no other Consideration than reserving a Pepper Corn, if it be demanded, shall work as a Bargain and Sale, and so to make the Lessee capable of a Release.

And it was Resolved that it should, and that the Reservation made a sufficient Consideration to raise an Use, as by Bargain and Sale. Vid. 10 Co. in Sutton's Hospitals Case.

Rozet *versus* Rozet.

An Indebitatus Assumpsit pro parcell' Corii ad specialem instantiam & requisitionem of the Defendant, sold and delivered to J.S. Ex sic inde Indebitar' existens the Defendant promised to pay.

Upon Non assumpsit pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment that there is no Promise laid, and no Reason to presume a Promise, when 'tis the very ground of the Action, tho' after a Verdict. And admitting there were a Promise; yet it being Collateral it did not make a Debt, but should have been brought as an Action upon the Case, Mo. 702. and Dyer 230. And hereupon Judgment was stayed. Tho' (as I hear) in the King Bench about two years since, between Danbey and Kent, they held such a Case well enough after a Verdict. *Quare.*

Termino Sanctæ Trinitatis, Anno 33 Car. II.

In Communi Banco.

Page *versus* Kirke.

In an Action of Trespas, upon Not Guilty at the Assizes in Suffolk, a Verdict was found for the Plaintiff, and 10 s. Damages and 40 s. Costs, and Judgment entered accordingly.

And an Action of Debt was brought upon the Judgment, and the Defendant pleaded Specially the Statute 22 & 23 of Car. II. ca. 9. against Recovering more Costs than Damages (where the Damages are under 40 s.) in Trespas, unless certified by the Judge that the Title was chiefly in question, the Words of the Statute being, If any more Costs in such Action shall be awarded, the Judgment shall be void.

To which the Plaintiff Demurred, and the Plea was held Insufficient; because the Verdict was for 40 s. Costs, and not Costs increased by an Award of the Court.

2. If the Judgment were Erroneous, yet it was hard to make it avoidable by Plea, notwithstanding that the Words of the Statute are, Shall be void.

Termino

Termino Sanctæ Michaelis, Anno 33 Car. II.

In Communi Banco.

Onslowes Case.

HE brought an Action against a Bayliff (being the chief Magistrate) of a Corporation, for that although he were chosen one of the Burgesses to serve in Parliament for the Corporation by the greater Number, &c. yet the Bayliff to disappoint him of sitting, and to bring trouble, &c. upon him, did return another Person in the Indentures, together with him, to his Damage, &c. Upon Not Guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment that the Action would not lie. And of that Opinion were the whole Court, viz. North Chief Justice, Wyndham, Charkton and Levins, for they said they had no Jurisdiction of this Matter, the principal part thereof being a Return in Parliament. No Action before the Statute H. 6. &c. did lie against a Sheriff or chief Officer of a Corporation for a false return, and the Courts at Westminster must not enlarge their Jurisdiction in these matters further than those Acts give them. That there were no Presidents of any Actions at the Common Law save Nevils Case in the late times and Sir Samuel Bernardistons Case, both which miscarried. In the Long Parliament there were a great many double Returns, but no Actions had been brought, which is a great Argument that no such Action lies, as Littleton argues upon the Statute of Merton of disparaging an Heir.

Termino

Termino Paschæ, Anno 35 Car. II.

In Communi Banco.

The Lord Conwallis's Case.

THE Case was, Isaac Pennington a Copyholder of the Mannor whereof my Lord Conwallis is now seised, committed Treason in the matter of the Murder of King Charles the First; and then about Anno 1655. surrendered into the hands of the Lord of the Mannor his Copyhold Lands to the use of some of his Children, who were admitted. In 1659. the Mannor was aliened to the Lord Conwallis, then came the Act of Attainder 12 Car. 2. whereby Tychburn with other Regicides were attainted, and thereby it was Enacted, That all their Mannors, Messuages, Lands, Tenements, Rents, Reversions, Remainders, Possessions, Rights, Conditions, Interests, Offices, Annuities, and all other Hereditaments, Leases for Years, Chattels Real, and other things of that nature whatsoever they be, shall stand forfeited to the King, &c. Provided that no Conveyance, Assurance, Grant, Bargain, Sale, Charge, Lease, Assignment of Lease, Grants and Surrenders by Copy of Court Roll, &c. made to any Person or Persons, other than the Wife or Wives, Child or Children, Heir or Heirs of such Person or Persons, &c. After which Attainder, &c. the Lord of the Mannor caused the Lands to be seised, and brought an Ejectment.

The First Point, Was whether in Case of Treason or Felony the Lord can seise before Conviction or Attainder? And the Court seemed to be of Opinion, that no Seisure could be till Attainder, without Special Custom; but they agreed the presentment of the Homage was not necessary to precede a Seisure, or to entitle the Lord to take the advantage of a Forfeiture; but in case of a Capital Crime it would be unreasonable and inconvenient to permit the same to be tried or controverted in a Civil Action before the Conviction appeared upon Record.

Secondly, Whether this were such a forfeiture as the Lord was bound to take notice thereof; for if no notice, then the acceptance of the Surrender, &c. would not preclude him from taking advantage of the forfeiture. And the Court inclined that the Lord should not be presumed to take notice in this Case, as he shall in the

the Case of Failure of Suit of Court, Non-payment of Rent, &c. Vide 2 Cro. Matthews and Whetton 233.

Thirdly, Whether the Mannor being conveyed away before the Attainder shall purge the Forfeiture.

Justice Levins said, That although no advantage of this Forfeiture can be taken till Attainder, yet after Attainder it has relation, and the committing of Treason is the Forfeiture: There is a difference between an Heir taking advantage of a Forfeiture in the time of the Ancestors; and an Alliance in the time of the former Lord, Vid. Owen 63.

But then Justice Charleton declared his Opinion that the Copyhold was given to the King, by the Statute of 12 Car. for the generality of the words, other things of that Nature whatsoever, and that enforced by the Proviso, where mens Conveyances, Surrenders by Copy were mentioned.

But the other Justices seemed to be of another Opinion, for that Copyholds were never included in a Statute where any prejudice would thereby accrue to the Lord, unless expressly named; and for the Proviso, it might be satisfied by the Copyholds, which the Treasons might hold of the Kings Mannors, or where they had a Mannor held of the King, and had made voluntary Grants of Copyholds, and Surrenders made subsequent: And so 'twas said to be the Opinion of my Lord Hales, 16 Car. 2. when he was Chief Baron of the Exchequer. But however they were ordered to attend the Kings Attorney General, to know whether he desired to be heard to that point. Et adjournatur.

Anonymus.

UPON a Trial at Bar upon a Quare Impedit; the Case was, Parceners had made partition to present by turn; and an Usurpation is in the turn of one of them, whether this put all the rest out of possession, or the Sister which had the next turn should present when the Church became void. The Court inclined to an Opinion that it should put all out of possession, and would not permit a Special Verdict upon the motion of Serjeant Maynard, but a case was made of it for the consideration of the Judges, Vid. Kielway, and F. N. B. 35.

Anonymus.

IN an Ejectment: Upon a Special Verdict, an Usurpation had been made to a Church, and a Quare impedit brought to remove the Incumbent, and pending the Quare impedit, the perpetual Advowson was sold by the Plaintiff, and it was found *ea intentione*, that J. S. Clerk should be presented after the Usurper

per Incumbent removed, and accordingly after such removal J. S. was Presented, Admitted, Instituted and Inducted. And after Argument the Court gave Judgment for the Plaintiff, whose Lessee, supposing the Presentation, &c. void by the Statute against Simony had procured a Presentation from the King, and Admission, Institution and Induction thereupon, and the Court held it to be plain Simony.

Termino Sancti Michaelis Anno 2 Jac. II.

In Communi Banco.

Bathursts Case.

AN Action was brought against him, as Executor of an Executor of an Executor, against whom the Plaintiff had recovered a Judgment in Debt, and it was suggested that he had wasted the Estate of the first Testator, and so by the Statute 30 Car. 2. his Executor was liable in such Manner as his Testator would have been if he had been living. Upon Plene Administravit pleaded the matter was found specially, and that the Executor which wasted was indebted to the Defendant, whom he made Executor upon a simple Contract. And the Question was, whether the Defendant might retain for his Debt against the Debt, grounded upon the Devastavit: And the Court held that he might, for it shall not be adjudged a Debt superior to a simple Contract.

Termino

Termino Paschæ, Anno 22 Car. II.

In Communi Banco.

Grove and Dr. Elliot Chancellor of Sarum.

A Motion had been made for a Prohibition, upon a Suggestion that per legem terræ no man ought to be Judge in his own Cause, &c. nor ought any man to be compelled to answer Articles prosecuted against him ex mero Officio, &c. And that contrary hereto the Defendant had attyled against the Plaintiff, that he did out of his own private Will and Spirit, and contrary to the Laws, keep Conventicles, and did allow and permit one South and others, pretended Ministers, and not allowed by the Church, to Expound and Preach to himself and many others, &c. and this was ex promotione A. B. Notarij Publici, &c.

It was not alledged in this Libel of Articles, that there was any Presentment of this Matter, but the Register of the Court swore that there was a Presentment made by the Curate of the Parish, where, &c. and that a certain Copy which he delivered here into Court was a true Copy thereof.

¶ Ellis Serjeant for the Plaintiff,

1. First, Conventicles are properly punishable at the Common Law, and not by the Ecclesiastical Law, they are inquirable upon every Commission of Oyer and Terminer, 4 Inst. 162. and the late Act against Conventicles was in force at this time.

Secondly, No man ought to be proceeded against in the Spiritual Court without a due presentment. 25 H. 8. c. 14. declares that 'tis not reasonable that any Ordinary by any suspicion conceived of his own fancy, without due accusation or presentment, should put any Subject of this Realm into the infamy or slander of Heresie And the reason of this extends to other things as well as Heresie. Indeed this Statute is repealed, but as my Lord Coke 12 Rep. 26. observes it was herein declaratory of the Common Law; and 'tis great reason that there should be a presentment and accusation by some proper Person, for otherwise an innocent Person in case of false accusation would not know where to have his remedy.

Object. Here is a Presentment by the Curate, and by the 113 of the Canons made 3 Jacobi, a Curate in the absence of the Rector may present.

¶

Ans^r.

Answ. First, These Canons were never confirmed by Act of Parliament, and without that there cannot be any Canons made to alter the Law, 12 Co. 72, 73. at least they can bind none but the Clergy, Vid. Mo. 755. and one reason thereof is, because the Laity have no Representatives in the Convocation.

Secondly, This Canon says only, that a Curate may present in the absence of the Rector; it doth not appear here that the Rector was absent.

Thirdly, All such Presentments ought to be upon Oath, and this is not proved so to be: The Courts in this Hall cannot proceed upon any such thing without Oath.

Fourthly, It is not alledged in the Libel of Articles, that there was any Presentment at all, only the Register comes in and saith he finds such a Presentment among the Acts of the Court, so that Issue cannot be taken whether any or no: So it must be taken his proceeding was ex Officio mere without Presentment, and 'tis as great a mischief as was by reason of common Informers before the 18 Eliz. c. 5. appointed their names to be endorsed upon all Process sued out by them.

Thirdly, In this Case they will examine upon Oath: Now no Layman ought to answer upon Oath except in Cases matrimonial and Testamentary, 12 Co. 26, 27. 3 Cro. 262.

Baldwyn contra.

First, That Convencicles are punishable at the Common Law, or were by the late Statute, does not disprove or take away the Jurisdiction of the Spiritual Court, for the proceedings are directed respectu. We proceed against Convencicles, as being against the Peace, and as being against the Laws of the Church, and to prevent the broaching of Heretodox Opinions, as in our Court we do agere civiliter by Action, & criminaliter by Information for the same matter.

Secondly, The proceeding in this Case is according to the constant course of proceeding in these Courts: for when a Presentment is made, they form Articles thereupon, tibi articulamus & obijcimus. &c. but they never recite or mention the Presentment in the Articles, and therefore it does not, nor need it appear in them in this Case. So that it cannot from hence be concluded to be a prosecution ex Officio mere. November 25 H. 8. when it was in force concerned Heresie only.

As to the Presentment made in this Case by the Curate.

1. Those Canons are not to be questioned, they have been always allowed, having been confirmed by the King.

2. The Rectors absence shall be intended.

3. The Churchwardens themselves, whose ancient and unquestioned Office it is to make Presentments, don't take a particular Oath upon all the Presentments they make, but they do it by virtue

vertue of their general Oath of Churchwardens, and Ministers do the same (as the Bishop of Sarum present in Court had asserted just before in verbo Sacerdotis,) or rather by vertue of their general Oath of Canonical Obedience.

4. They are not bound to specify the Presentment in their Articles; and this is not so liable to the Objection of Mistake and Unreasonableness, as the Informations daily brought in the Kings-Bench in the Name of the Clerk of the Crown; which Informations are approved and preserved by the very Statute of 18 Eliz. c. 5. And if there be no due Presentment, 'tis an Error which consists in not proceeding according to their Rules, i. e. the Canon Law, and the proper remedy for that is by Appeal; and our Courts will not take notice whether they observe their own Laws. Prohibitions are only to be granted when the Common Law is invaded and interfered with.

Thirdly, As to the examining of the Party upon Oath, here is no cause to mention it; and indeed it is not their course, for they only ask him ore tenus, whether he will confess or deny the Articles; if he deny them, then there is *lis contestatio*, and they proceed to examine Witnesses to prove it; and if it be not proved, the Informer is condemned in Costs.

Justice Wyld. I am of Opinion that there should go no Prohibition. We must Judge only upon the Suggestion: Here 'tis suggested that the Defendant proceeded against the Plaintiff *ex Officio*; but that may be understood two ways, either that he proceeded officiose on his own head, or that he proceeded out of Duty according to his Duty, and nothing appears to the contrary of this last, and then he did as he ought. If the Plaintiff had suggested that by the Law of the Land there ought to be a Presentment by such persons in such manner, &c. he might have brought that into question.

Archer of the same Opinion. We must give faith and credit to their proceedings, and presume that they are according to their Law, 4 Co. 29. The King with the Convocation may make Orders and Constitutions for the Government of the Church.

Tyrrell of the same Opinion. But if the Suggestion were that no Presentment by a Curate were sufficient, nor unless it were upon Oath, &c. I should have been of Opinion for a Prohibition. I hold that the King and Convocation, without the Parliament, can't make any Canons which shall bind the Laity though they may the Clergy, Vid. 35 H. 8. c. 19.

Vaughan of the same Opinion. If the Articles were exhibited merely *ex Officio*, i. e. out of the mind of the Chancellor himself they were not warrantable. But there is no colour for this Suggestion, for they appear to be the Information of a Publick Notary. As to the Presentment which is thought requisite by the pre-

amble of 25 H. 8. c. 14. declaratory of the Common Law or not, it is a sufficient Answer to say that the Act is repealed and therein the Preamble: And for ought any man knows, the Preamble was the Cause of the Repeal; this has been the only specious Objection. As to the Canons; Jacobi certainly they are of force, tho' never confirmed by Act of Parliament. Indeed no Canons of England stand confirmed by Act of Parliament; yet they are the Laws which bind and govern in Ecclesiastick Affairs. The Convocation with the License and assent of the King under the Great Seal may make Canons for regulation of the Church, and that as well concerning Laicks as Ecclesiasticks; and so is Linwood. Indeed they cannot alter or infringe the Common Law, Statute Law or Kings Prerogative, but they may make alterations (viz. in Ecclesiastical Matters) or else they could make no new Canons: All that is required of them in making of new Canons is, that they confine themselves to Church Matters. As no Human Law can be made which is contrary to the Divine Law; and it is binding only in those things which are permissa by the Divine Law: So no Canon Law can be made which is repugnant to the Law of the Land. The Subject Matter is in the Case. The permissa, the things of Ecclesiastical Nature, which are left indifferent by the Law of the Land; in this Case we must presume there was a Presentment according to their Law, if not the Remedy is by Appeal. We ought not to assume the Jurisdiction of Judging upon their Law, but give way to their course of Proceedings.

Serjeant Ellis. I only intended that Canons cannot be made to alter the Law without Parliament.

Curia. We all agree as to the first Exception, that the Spiritual Court may proceed against Conventicles, as a Spiritual Offence, tho' not as a Civil.

As to the Second, That they have Consensus of all false Worshipers.

As to the Third, That there is nocolor or occasion to make it.

Note. The Course of the Spiritual Court is not to make a Significavit until forty days after the Excommunication. General Citation is a cause of Prohibition, for it ought to be expressed for what Cause: But this is cured by Appearance or Appeal.

Termino

Termino *Pasche*, Anno 1 *Willielmi & Maria*,
In Communi Banco.

Anonymus.

Upon a Suggestion of Devastavit of a Feme Executrix, it was, That the Baron and Feme, devastaver' & converter' ad usum ipsorum: And upon the Issue it was found accordingly.

It was moved in Arrest of Judgment, That they could not Convert to their own use: And so in Trover and Conversion, Quod converter' ad usum ipsorum is not good.

Sed non allocatur: For here the material part of the Issue was the Wasting, which the Baron and Feme might do jointly, and the Conversion is nothing to the purpose. Vid. 2 Sand. Issue upon a Devastavit.

Anonymus

In an Assumpsit, in Consideration that he paid him so much Money, he promised to pay a like Sum into the Court, and appear.

Object. That there is no benefit, as if it were in Consideration that he deposited so much Corn, he promised to deliver it over, 3 Cro.

Cur'. This is not like; for here he has benefit by the use of the Money, but in the other case he is to deliver the Corn in specie.

Anonymus.

It was moved, that where the Defendant was a Constable, and a Verdict for him being in the Execution of his Office, and no Memorandum appeared, as was usual upon the Postea to give him Double Costs, according to the Statute of 7 Jac. that it must be now supplied.

But per Curiam, We cannot do it; because the Statute says, the Judge before whom the Cause was tried should allow double Costs; and the Court cannot do it, unless the Judge of Assize had ordered the Postea to be marked.

Anonymus.

Anonymus.

It was pleaded in Abatement, that the Declaration varied from the Original in the Name of the Defendant and his Addition. It was said that in such case the Curfitor or Clerk that made out the Writ may be ordered to attend; and if his Instructions were right, to amend the Writ by the Instructions.

Anonymus.

Where a man was Outlawed after the Plaintiff had him in Prison, a Reversal was Ordered at the Charge of him that prosecuted the Outlary, it appearing to be an Abuse.

Anonymus.

Covenant, that he shall Have and Enjoy; and a Breach was assigned, that such an one brought Trespass and Recovered. And after Verdict it was moved in Arrest of Judgment, that it does not appear that he which recovered in Trespass had a Title.

Serjeant Levins. Here is an express Covenant, that he should quietly hold the Possession, and he is disturbed in his Possession, tho' upon no Title. And so is Dyer 328. a. Vaughan 120. Vide Hob. 35. Et Adjornatur.

Termino

Termino Sanctæ Trinitatis, Anno 1 W. & M.
In Communi Banco.

Anonymus.

A Motion was made to change a Venue, where an Attorney was Plaintiff.

Object. He has privilege to lay it in *Middlesex*, because of his Attendance.

Ans. But here he has laid it within London.

Curia. Then let the Venue be changed; for then he is to be considered as a person at Large.

Anonymus.

A Motion was made for a Prohibition to a Suit for Tythe Lamb, upon a Suggestion of a Modus to pay 2 d. falling in the Plaintiffs Farm in the Parish.

Object. A Prohibition was granted before to stop this Suit upon a Suggestion, which was tried and found for the Plaintiff, and a Consultation granted.

Ans. That Suggestion was for 2 d. to be paid for every Lamb which fell in the Parish, and this only to a particular Farm, and is not within the Statute of 50 Ed. 3. that a second Prohibition shall not be granted after a Consultation awarded in the same Suit. Vid. 1 Co. 151. Scroud and Hoskins, 1 Roll. Rep. 378.

Note here, If this Matter had been found by the Verdict, no Consultation had been granted, Hob. 192.

But here the Court inclined against a Prohibition by reason of the said Statute of 50 Ed. 3.

Anonymus.

A Fine was acknowledged before Herbert Chief Justice, by a Man and his Wife, 7 Decemb. 1689. and by reason that the late King James had deserted the Kingdom and taken away the Great Seal, there followed a stop of Proceedings at Law; and the Woman died the 10th of February following, and upon the 11th of February the Kings Silver was paid, as upon a Writ of Covenant in King James's time, tho' no Writ was then sued out. But afterwards a Writ of Covenant was taken out, Returnable in

Michaelmas

Michaelmas Term last, which was sealed with the Seal of King William and Queen Mary; and the Fine was Engrossed and made as a Fine in Michaelmas Term.

And this present Term it was moved, that the Fine might be vacated, and the Book of 1 H. 7. fo. 9. was cited, where the Cognizance of the Fine was in the time of R. 3. and afterwards a Writ of Covenant was sued in the time of Henry the Seventh, which being shewn to the Court they stopped the Fine; tho' 'tis said in that Case, that 'tis the common course to take the Acknowledgment of Fines, and then to sue out a Writ of Covenant: But they said they would not permit a President, That an Acknowledgment of a Fine should be in the Predecessor King, and the Writ of Covenant in the time of the Successor.

But the Court (after the Cause had been twice moved, and full Consideration of it) gave their Opinions seriatim, that the Fine should stand. For the Entering of the Kings Silver after the parties death could not be now Examined, in regard the Fine was engrossed and compleated as a Fine of Michaelmas Term. And so was Farmer's Case Hob. 330. and Carill's Case Dyer 220.b. The Court would not stop a Fine taken of a Feme Covert when she was dead, 1 Roll. Rep. 114.

Note, Several Presidents were shewn where Fines were set aside for undue Practice in the Passing of them; (viz.) in case of Personating Fines taken by Commissioners of Infants, &c.

Anonymus.

In an Action of Trespass, Quare clausum fregit, and putting Stakes upon his Ground, it was held that this was within the late Statute, which Enacts, That the Plaintiff shall recover no more Costs than Damages; but if any thing had been taken away (of how little value soever) it had not been within the Statute.

Anonymus.

A Prohibition was granted to a Suit for Tythes, upon a Suggestion that the Tythes were set out; and it was moved for a Consultation, that he did not alledge Notice given to the Parson: And the Bishop of Carlisle's Case Hob. 107. was cited, where a Custom was laid to set out Tythe Wool, absque aliquibus visu & tactu, of the Nine parts by the Parson, &c.

Roll. Abr.
2. pl. 19.

But the Court were all of Opinion, the Case having been twice moved, that no Notice need be given to the Parson. And so it is said to be Adjudged in Noy 19. tho' the Ecclesiastical Law is otherwise. So is the Case of Chafe and Ware, Rolls tit. Tythes 643. Style 342. where 'tis held, that if an Action be brought against the

the Parson, for not taking away his Tythe after set out, Notice must be given before such Action. For the Bishop of Carlisle's Case in Hobart does not make against this; for there a Custom was laid to exclude the Parson from seeing the Tythe which is to be set out, which Custom is not to be omitted. Vid. Rolls Abridg. tit. Dismes 647. And the 2 of E. 6. cap. 13. Enacts, That it shall be lawful for every person, to whom Tythe ought to be paid, to view his Tythe set forth and severed from the Nine parts.

Massingburn versus Durrant.

IN an Action of Trespass for breaking of his Close and cutting of his Corn: The Plaintiff declared of several Trespasses some whereof were in the time of King Charles the Second, and other in the time of King James the Second, and Judgment was by Default. And after a Writ of Enquiry of Damages Returned, Error was brought in the Kings Bench, and assigned that there was no Original, and upon that a Writ was awarded to the Custos Brevium, who certified an Original between the parties, taken out in the time of the late King James, which concluded contra pacem nostram, And this could not be taken to be an Original in this Cause; because then it should have Concluded, contra pacem nostram, nec non contra pacem Caroli Secundi nuper Regis; and for that a Rule was in the Kings Bench to Reverse the Judgment, nisi.

It was thereupon moved in this Court, that the Original might be amended; for that it was said, that the Instructions to the Curfitor were right, and a Form given him to draw the Conclusion of the Writ contra pacem nostram, & contra pacem nuper Regis.

And it was admitted on the other Side, that the Instructions were so given to the Curfitor.

But then it was Objected, That this was part of the Legal Form of the Writ, and in that an Original was not amendable. And so Parker's Case in Hutton 56. where Indicari was put in a Writ upon the Statute of Hue and Cry instead of Indictari, and it could not be amended, tho' that word was right in the Instructions to the Curfitor. And so Blackmore's Case in 8 Co. there (in the principal Case) the Instructions were in a Matter of Fact, as in the addition of the party, Knight, instead of Gentleman; but in that Case held, That the Writ could not be amended in the Legal Form.

To this it was Answered, That this was in Matter of Fact; for a Writ of Trespass does not distinguish Trespasses in one Kings Reign or another, that is only distinguished by the Conclusion contra pacem nostram & nuper Regis, and for that the Instructions were particularly given, and that is the manner of

giving the Instructions, when there are Trespasses to be declared upon in the Reigns of several Kings.

And of that Opinion was all the Court, and Ordered the Amendment accordingly: But that the Plaintiff in the Writ of Error should have his Costs, because the Error was brought and assigned by reason of this Fault in the Writ.

Note, The Curfitor was not required to attend with his Instructions; because they were agreed to be as the Plaintiffs Counsel in the Action alledged, and so no Examination of the Curfitor requisite.

Note in Blackamore's Case in the 8 Co. it is said, that the Writ shall be Amended by the Curfitor. *Quære.*

Fowkes versus Joyce.

In a Replevin the Defendant avowed the Taking, as a Distress for Rent in Barr of the Avowry.

The Plaintiff Replied, That the Avowant had Lett the place where, with an Inn, and that he was driving his Cattle to London ad proficuum inde faciend', and that he asked leave of the Avowant to put his Cattle in the Ground for a Night, and that he gave him leave, with the Consent of the Lessee, Virtute cujus he put in his Cattle prout ei bene licuit.

Upon which it was Demurred; and to maintain the Barr to the Avowry it was urged, That being put in the Ground belonging to the Inn they were priviledged, and that being driving to London to a Market, and put in for Pasture by the way, they could not be Distrained.

To this it was Answered, That there was nothing appeared in the Pleading of a Common Inn, and so the Matter did not come in question; neither was it set forth that the Cattle were driving to Market, but only to London, ad proficuum inde faciend'. And besides, in the Barr to the Avowry the License is the only Matter relied upon, which doth not Conclude the Lessor from taking the Distress. And of that Opinion was the Court.

And the Court held, That Cattle driving to a Market, and put into Pasture by the way, were not priviledged from being Distrained. For 'tis by the Statute of Marlbridge That Beasts cannot be Distrained in the High-way; and not by the Common Law.

Morley

Morley *versus* Polhill, & al'.

Suffex' fl. **E**DWARDUS Polhill nuper de Burwash in Com' prædicto Armig', & Walterus Roberts Jun' nuper de Saleherst in Com' prædicto Armig', Executores Testamenti Roberti Fowle Armig', Assign' Thomæ Carey Armig', Executores Testamenti Samuelis Gott Armig', nuper dicti Samuelis Gott of Grays Inn in the County of Middlesex Esquire, Summon' fuer' ad respondend' Francisco Morley Armig', Executori Testamenti Georgii nuper Domini Episcopi Winton' px Successori Brian', nuper Domini Episcopi Winton' defunct' de p'ito, quod teneat ei convençonem inter præfat' Brian' nuper Dom' Episcopum Winton' in vita sua, & præfat' Samuelem Gott in vita sua factam secundum vim formam & effectum quarundam Indenturarum inde inter eos confectarum, &c. Et unde idem Franciscus Morley per Joseph' Newington Attorn' suum dicit quod cum per quandam Indentur' factam apud Westfield in Com' prædicto vicesimo quarto die Decembr', Anno Regni Domini Caroli Secundi nuper Regis Angl', &c. Decimo tertio, inter præfat' Brian' nuper Dom' Episc' Winton' in vita sua, per nomen Reverend' Patris in Deo Brian', per Divinam providentiam Dom' Episc' Winton' ex una parte, & præfat' Samuelem Gott in vita sua, per nomen Samuelis Gott de Grays Inn in Com' Midd' Armig' ex altera parte, cujus quidem Indenturæ alteram partem, sigillo prædict' Samuelis Gott in vita sua signat', idem Franciscus hic in Cur' p'fert' cujus dat' est eisdem die & anno Testat' sit quod præfat' Brian' tunc Dominus Episcopus Winton', pro & in consideratione sursumreddiçon' prioris Indenturæ, (Anglicè, *Leas'*) quæ fuit determinare (Anglicè, *to expire*) in mense Augusti, qui tunc foret in Anno nostri Domini Dei Millesimo sexcentesimo sexagesimo tertio, dimississet, concessisset, & ad firmam tradidisset. Et prædictus Brianus tunc Dominus Episcopus Winton', per Indentur' prædictam pro seipso, & successoribus suis, dimisit, concessit & ad firmam tradidit eidem Samueli, Omnes illas Rectorias (Anglicè *Parsonages*) de Rye & Westfield, & quilibet earundem cum suis pertin' in Comitatu Suffex', & omnia ædificia, structura, horrea, stabula, pomaria, gardina, terras, tenementa, hæreditamenta, prata, lesuras, pasturas, terras Glebarum boscos, subboscos Decimas, (Anglicè, *Tenths*) Decimas (Anglicè, *Tythes*) oblacon', obvencon', pficua, commoditat' (Anglicè, *Commodities*) & advantagia (Anglicè *Advantages*) quascunque dictis Rectoriis de Rye & Westfield prædict', vel alteri illarum spectan' sive appertinen' (except' & semper reservat' præfat' Dom' Episcopo, & successoribus suis extra dimissionem prædict' donis Donaçonibus, Advocacionibus, Præsentationibus, Nominationibus & Jure patronatus (Anglicè, *Right of Patronage*) Vicariorum de Rye & Westfield prædict';) & cujlibet illarum Habend' & tenend' dictas Rectorias, & omnia & singula al' præmissa

Covenant by the Executors of a Bishop, against the Executors of an Assignee, Executor of the Lessee.

The Count.

The Indenture set forth.

Profert in Curia.

The Consideration.

The Demise of Rectories and Parsonages.

Gleabs, Tythes, Oblations, Obventions, &c.

Exception of the Presentation to the Churches.

Habend,

H 2

cum

cum suis pertin' (except' præexcept') præfat' Samueli Gott, Executo-
 ribus, Administratoribus & Assign' suis à confectione Indentur'
 prædict', usque plenum finem & terminum, & pro & duran' plen'
 termino Viginti & unius annorum deinceps prox' sequen', &
 plenar' complend' & finiend'. Reddend' & solvend' proinde annuatim
 duran' dicto termino præfat' Domino Episcopo, & successoribus suis,
 apud suum & suos Scaccarium apud Wolvesey prope Winton' annual'
 reddit viginti librarum legalis monet' Angl' ad Festa *Annunciationis*
beatæ Mariæ Virginis & *Sancti Michaelis Archangel'*, per æquas &
 æquales portiones, (videlicet) pro dicta Rectoria de Rye annual'
 Reddit' octo librarum. Et pro prædict' Rectoria de Westfield
 annual' reddit' duodecim librarum; Acetiam reddendo & solvendo
 proinde annuatim duran' dicto termino prout hic postea mentionat'
 est præfat' Domino Episcopo, & successoribus suis super dies &
 apud locum prædict' per æquas & æquales portiones annual' reddit'
 viginti librarum similis legalis Monet' Angl' ad solvend' per dict'
 Dominum Episcopum, & successores suos annuatim Vicariis pro
 tempore existen' parochial' Ecclesiarum de Rye & Westfield prædict',
 videlicet, Vicario pro tempore existen' de Rye prædict' annual' sum'
 duodecim librarum & decem solidorum, & Vicario pro tempore
 existen' parochial' Ecclesie de Westfield prædict' annual' summam
 septem librarum & decem solidorum in prosecutione (Anglicè, *pursu-
 ance*) tunc Regiæ Majestatis directionis pro augmentationibus in ea
 vice dat' (prima solutio inde pro dictis Vicariis faciend' ad Festum
Annunciationis beatæ Mariæ Virginis, quod tunc foret in Anno Dom'
 nostri Dei Millesimo sexcentesimo sexagesimo tertio.) Et præfat'
 Samuel Gott pro seipso Executoribus, Administratoribus & Assign'
 suis convenit promisit & concessit, ad & cum præfat' Domino
 Episcopo, & successoribus suis per Indentur' prædict', quod ipse
 præfat' Samuel Gott, Executor, Administrator & Assignat' sui, de
 tempore in tempus & ad omnia tempora tunc postea duran' dicto
 termino viginti & unius annorum, ad ejus, eorum, vel alicujus eorum
 propr' custag' & onera quando, & toties quoties necesse foret, vel
 requireret bene & sufficient' repararent, emendarent, manutenerent,
 supportarent, (Anglicè, *uphold*) sustinerent, præseperent (Anglicè,
seentr) & custodirent tam prædict' Rectorias & al' præmissa, (except'
 præexcept') quam Sacaria (Anglicè, *the Chancels*) Ecclesiarum de
 Rye & Westfield prædict', & earum alterius in per & cum omnibus
 & omnimodis requisit' (Anglicè, *needful*) & necessar' reparationibus,
 & emendationibus quibuscunque, ac eadem & earum quilibet sic
 bene & sufficient' reparat, emendat, manutent, supportat, sustent,
 præsept' & custodit ad finem prædict' termini, vel aliam citiorem,
 determination', dimission' prædict', utrum prius accideret, relin-
 querent sursum redderent & traderent (Anglicè, *yield up*) præfat'
 Domino Episcopo & successoribus suis, prout per eandem Indentur'
 prædict' (inter alia plenius liquet & apparet) Virtute cujusquidem
 Indentur'

For 21 years.

Reddend.

A further
Reservation.A Covenant
to Repair.And to yield up
all Repaired at
the end of the
Term.

Indentur' prædictus Samuel Gott in Rectorias & tenementa præd' cum pertin' superius dimissa (except' præexcept') intravit & fuit inde possessionat' Et sic inde possessionat' existen' idem Samuel postea scilicet quintodecimo die Septemb' Anno Regni dicti nuper Regis vicefimo tertio apud Westfield præd' condidit testamentum & ult' volunrat' suam & per eandem prædictum Thomam Bird Executorem ejusdem testamenti & ult' volunrat' suæ constituit & ordinavit Posteaque ibidem obiit de Rectoriis & al' dimissis præmissis prædictis cum pertin' sic ut præfertur possessionat' Post cujus mortem prædictus Thomas Bird in Rectorias & al' dimissa præmissa cum pertin' intravit & fuit inde possessionat' Et sic inde possessionat' existen' prædictus Thomas Bird postea scilicet primo die Octob' Anno Regni dicti Domini nuper Regis vicefimo quinto apud Westfield præd' concessit & assignavit Rectorias & cætera præmissa præd' cum pertin' ac totum statum jus æculum interesse & termin' annorum adtunc ventur' & inexpirat' de & in eisdem (virtute Indentur' præd', præfat' Roberto Fowle Executor' & Assign' suis) virtute cujus quidem concessio' prædictus Robertus Fowle in Rectorias & cætera præmissa præd' cum pertin' per Indentur' præd' dimissa intravit & fuit inde possessionat' Et sic inde possessionat' existen' idem Robertus Fowle postea & ante suam termin' prædicti superius dimiss' scilicet decimo die Decembris Anno Regni dicti nuper Regis tricesimo quarto apud Westfield præd' obiit de Rectoriis & al' tenementis prædictis cum pertin' superius dimissis possessionat' Et prædictis Brianus de reversione Rectoriar' & cæterorum præmissorum prædictorum præd' seisit' existens in dominio suo ut de fodo in jure Episcopat' sui prædicti prædictus Brianus postea scilicet undecimo die Decemb' Anno tricesimo quarto supradicto apud Westfield præd' obiit de Reversione Rectorie & cæterorum præmissorum præd' cum pertin' sic ut præfertur seisit' post cujus mortem reversione tenementorum præd' cum pertin' deven' prædicto Georgio nuper Episcop' Winton' prox' successori prædicti Briani in Episcopat' præd' debito modo constituit & præfectus in jure Episcopat' sui præd' Et prædictus Georgius Episcopus de reversione tenementorum præd' seisit' existen' & prædict' Edwardus Polhill & Walterus Roberts de Rector' & cæteris præmissis cum pertin' sic ut præfertur possessionat' existens præd' terminus viginti & unius Annorum de & in præmissis sic ut præfertur dimissus finivit post mortem Brian nuper Episcop' Winton' & in vita prædicti Georgii prox' successor' præd' Briani scilicet vicefimo tertio die Decembris Anno Dom' Millesimo Sexcentesimo Octogesimo Secundo (eodem Georgio tunc Episcopo Winton' de reversione tenementorum prædictorum sic ut præfertur seisit' existen' Et idem Georgius Episcopus Winton' postea scilicet tricesimo die Decembris Anno Regni dicti nuper Regis Tricesimo Quarto supradicto apud Westfield præd' condidit testamentum & ult' volunrat' suam & per eand' constituit & ordinavit prædictum Franciscum Morley Executorem ejusdem Testamenti posteaq' ibidem

The Lessee Entered.

And made his Will.

And died possessed.

The Executor entered.

And granted to the Defendants Testator.

Who Entered.

And Died.

The Bishop being then seised of the Reversion in the Right of his Bishoprick. Died seised.

And the same came to his successor, Bishop. Who was duly made Bishop.

The Term expired.

The succeeding Bishop made his Will.

And made the Plaintiff Executor and died.

ibidem obiit Ac licet prædictus Brianus Dominus Episcopus in vita sua Et præfat' Georgius Dominus Episcopus post ipsius Briani mortem cujus prox' Successor' (in Episcopat' præd' prædictus Georgius Dominus Episcopus fuit in vita sua) bene & fidelit' observaver' performaver' & perimplever' omnes & singulas convention' concessiones articulos & agreementa in Indentur' præd' specificat' ex parte ipsius Briani Dom' Episc' & successorum suorum observand' perfor' mand' & perimplend' secundum formam & effectum Indentur' præd' idem tamen ~~Franciscus~~ in secundo die qd' prædictus Edwardus Polhill & Walterus Roberts ante finem termini prædicti & post mortem prædicti Roberti Fowle (cujus Executores prædicti Edwardus & Walterus sunt) in vita prædicti Georgii nuper Episcop' Winton', scilicet, vicesimo die Decembris Anno Regni dicti nuper Regis tricesimo quarto permiser' prædictum Sacrarium (Anglicè, the Chancel) Ecclesiæ Parochial' de Westfield præd' (parcell' præmissorum stare & esse discoopert' pro defectu sufficientis tecturæ inde & parietes muros ostia & pavement' ejusdem Sacrar' fore ruinosa & in decasu pro defectu sufficien' tabulation' crustiation' (Anglicè, Plastering) & emendatione inde cum lapidibus & aliis necessariis materialibus & vitrum de fenestris Sacrar' illius fore fract' & dirupt' & fenestras illas stare & esse minime vitriat' (Anglicè, unglazed) per qd' grossum maheremium Sacrar' illius per tempestat' pluvial' super ill' descendens ac per vim venti superinde affluens putrid' devenit & corrupt' ac ratione inde Sacrar' ill' ruin' minatur Necnon prædicti Edwardus Polhill & Walterus Roberts eisdem die & anno ult' præmentionat' permiser' unum horreum Rectoriæ de Westfield præd' spectan' ac parcell' præmissorum superius ut præfertur dimissorum stare & esse discoopert' ruinos' & in decasu pro defectu sufficien' tegminis contabulationis (Anglicè, Boarding) & substructionis (Anglicè, Groundsilling) per qd' grossum maheremium horrei prædicti putrid' & corrupt' deven' ac horreum prædictum penitus corruit & in terram cecidit pro defectu reparationis præd' Prædictiq; Edwardus Polhill & Walterus Roberts Sacrar' præd' & horreu' præd' ad aliquod tempus postea ante finem ejusdem termini minime reparaver' seu emendaver' Sed Sacrarium præd' & horreum præd' sic in decasu & irreparat' ut præfertur' existen' in fine termini prædicti absq; aliqua reparatione vel emendatione inde reliquer' contra formam & effectum conventionis præd' in Indentur' præd' urpræfertur mention' Et sic idem Franciscus dicit' qd' prædicti Edwardus Polhill & Walterus Roberts Conventionem præd' Samuelis Gott de eo qd' prædictus Samuel Gott convenisset & concessisset pro seipso Executoribus Administratoribus & Assign' suis ad & cum præfat' Brian' Episcopo & Successoribus suis qd' dictus Samuel Gott Executor' Administrator' & Assign' sui de tempore in tempus duran' dict' termino quando & toties quoties necesse foret bene & sufficient' repararent emendarent manutent' supportarent sustinerent præsepirent & custodirent tam præd' Recto;

The Breach as signed.

In permitting the Chancel and other Buildings to be out of Repair. The particulars of the Defects.

And was not repaired.

Et sic infregit Conventionem.

Rectorias & al' præmissa (except' præexcept') quam Sacraria Ecclesi-
arum de Rye & Westfield præd' & eadem sic sufficient' reparat' emen-
dat' manutent' supportat' sustentat' præcept' & custodit' ad finem
dicti termini dimiss' præd' relinquerent sursumredderent & trade-
rent præfat' Briano Episcopo & Successoribus suis) præfat' Georgio
Episcopo Winton' in vita sua prox' Successori prædicti Briani nuper
Episcopi nec præfat' Francisco post ipsius Georgii Episcopi mortem
(licet sæpius requisit') non tenuer' set injuste infreger' ac ill' eidem
Francisco huculq; tenere omnino contradixer' & adhuc contradic-
unde idem Franciscus dic' qd' ipse deteriorat' est & dampn' habet ad
valenc' ducentarum librarum Ex inde produc' sectam &c. Et pro-
fert hic in Cur' Literas Testamentar' prædicti Dom' Georgii nuper
Episcopi Winton' per quas satis liquet Cur' hic ipsum Franciscum
fore Executorem Testamenti prædicti & inde habere Administra-
tionem, &c.

*Profert in Cur'
the Letters Te-
stamentary of
the Bishop.*

Et prædictus Edwardus & Walter' per Robert' Spiller' Attorn'
suum ven' & defend' vim & injur' quando, &c. Et dic' qd' narratio præ-
dict' materiaq; in eadem content' minus sufficient' in lege existit ad
prædictum Franciscum actionem suam præd' versus prædictos Ed-
wardum & Walter' habend' seu manutenend' Quodq; ipsi ad Nar-
rationem illam modo & forma præd' fact' necesse non habet nec per
legem terræ tenentur respondere Et hoc parat' sunt verificare Un-
de pro defectu sufficien' Narration' ipsius Francisci in hac parte
ijdem Edwardus & Walterus pet' Judicium & qd' præd' Franciscus
ab actione sua prædicta versus eos habend' præcludatur, &c.

*The Defendants
demur general-
ly.*

Et prædictus Franciscus dic' qd' narratio prædicta materiaq; in
eadem content' bon' & sufficien' in lege existunt ad ipsum Francis-
cum actionem suam prædictam inde versus præd' Edwardum & Wal-
terum habend' manutenend' Quam quidem materiam idem Francis-
cus parat' est verificare Unde ex quo prædict' Edwardus & Walte-
rus ad narrationem præd' non responder' nec materiam in ead' con-
tent' aliqualit' dedixer' idem Franciscus pet' judicium & dampna sua
occasione fractionis conventionis præd' sibi adjudicari, &c. Et quia
Justic', &c.

*Joynder in De-
mur.*

Morly versus Polhill.

IN an Action of Covenant the Plaintiff declared as Executor to George Morly, late Bishop of Winchester, and sets forth that Brian the Predecessor of the said Bishop, had demised a Rectory and certain Lands to J. S. for 21 years, who had assigned it to the Testator of the Defendant, and that the Lessee covenanted with Brian and his Successors to repair the Chappel of the Church, and the Barns, &c. and assigned a breach in the not repairing by the Testator of the Defendant in the life of George Morly, and that the Lease afterwards expired.

To this the Defendant demurred, for that it was pretended, that the Executor of the Bishop could not bring this Action, for the Covenant was with the Predecessor Bishop and his Successors, and cited the Cases of Real Covenants, 1 Inst. 384, 385. A Par-cener after partition Covenants to acquit the other Parcener of a Suit, and the Covenantee assigns; the Assignee shall not bring Covenant. But the whole Court gave Judgment for the Plaintiff, and that the Executor is here well entitled to the Action for the Breach in the Testator's time.

Wright versus Wyvell.

IN an Ejectment the Plaintiff declared upon a Demise of Dorothy Hewly, and upon a Special Verdict the Case appeared to be thus.

That Christopher Hewly was seised of the Premises in Fee, and made his Will in this manner, I make my last Will in manner following,

As concerning my Personal Estate, first, I give and bequeath unto Ann Hewly my Wife, the sum of Six Hundred Pounds to be paid unto William Weddall of Eastwick, Esq; and it's for the full payment of the Lands lately purchased of the said Mr. Weddall by the said Christopher Hewly, and is already estated in part of a Joyn-ture to Ann my said Wife, during her natural Life, being of the value of Sixty Seven Pounds *per annum*; That of Wiskow, *Tork* and Malton, the Lands and Tenements there amounting to the yearly value of Sixty Three Pounds, in all One Hundred and Thirty Pounds, which being also estated upon my said Wife, it is in full of her Joyn-ture.

And after this he gives several Legacies, and the rest of his Personal Estate he gave to his Wife, and made her Executrix.

Then they find that he had made no settlement of the Pre-mises, or of any part of them, upon his Wife; and that the Les-sor of the Plaintiff was Heir at Law to Christopher Hewly, and that Ann the Wife is still living: So that the sole Question was, whether

whether the Lands should pass to the Wife upon these words in the Will; and divers Cases were put upon implicit Devises, as that his feoffees should stand seised to the use of J. S. has been held a good Devise to J. S. tho' there were no feoffees; Leon. 167, 162. Devise to his eldest Son after the death of his Wife, where the Wife takes, tho' nothing expressly devised to her. After Arguments heard on both sides; by the Opinion of Pollexfen Chief Justice, Rokeby and Veneris. Judgment was given for the Plaintiff, against the Opinion of Powell. Here it appears indeed that the Testator took it, that she had the Land; but it appears he did not intend to devise any thing by the Will, for he mentions that she was stated in it before; and in the Cases of implicit Devises there is no reference to any Act that should have conveyed the Land to the Devisee before; but the Will there passes the Land by Construction and Implication.

Again, This Devise is introduced with this Clause, as to the disposing of my Personal Estate; and throughout the Will he giveth only Personal Things.

Again, This recital comes in as part of another Clause, of an express Devise of the Six Hundred Pounds. But Powell relied upon the Case in Mo. 31. A man made a Will in this manner, I have made a Lease to J. S. paying but 10 s. Rent; this was held a good Lease by the Will; To which it was answered, That the Case there was of little authority, for it did not appear how that matter came in question, or in what Court or in what Action; and said only *sic tenus*; 3 Eliz. And Judgment here was given for the Plaintiff.

Bowyer versus Milner.

In a Formedon against several Tenants, one appeared and was Essoigned, and then another appeared, and it was moved whether he could be Essoigned by reason of the Statute of W. 1. c. 43. which seems to be that Parceners or Joyntenants should have but one Essoign, and that they should not souch.

Cur' Contrá. The Statute is to be understood of Essoigns after appearance, and so is the Book of 28 Ed. 3. 18. It is said to have been the Law of the Times for Tenants to souch before appearance; and so is Co. 2. Inst. 250. Hob. 8, & 46. The Case of Essoigns, if the Tenant voucheth two, one Essoign may be cast for each of them singly, Vid. Stat. of Glouc. c. 6.

Anonymus.

In an Action of Trespas de Uxore abducta cum bonis viri, to his damage of 10000 l.

Upon Not Guilty pleaded, and a Trial at the Bar, the Return of the Jury was Octab' Trin. and the Appearance Day was die Mercurij, at which day the Jury appeared; but it being appointed for the keeping of a solemn Fast by the King's Proclamation, the Jury was adjourned to the Day following, and then the Jury and Parties being at the Bar, a Plea was offered by the Defendants Counsel puis darrein continuance, that the Plaintiff was Excommunicated, and produced it under the Seal of the Court, and begun their Plea thus, Ad hunc diem, viz. die Jovis prox' post Octab' Trin', &c. So that the Plea came too late; for it should have been pleaded die Mercurij; for tho' the Jury was adjourned to Thursday, yet all Matters were entered as upon Wednesday. So this Plea did appear upon the Record to come too late, and for that Cause it was disallowed by the Court.

Note, This Plea was recited by Serjeant Trenchard in French, and then a Challenge was offered to the Array; for that it was Returned by J. S. as Sheriff of Buckinghamshire, who was made Sheriff in Michaelmas Term 1687, and had continued in the Office for more than three Months, and not taken the Oath, and subscribed the Declaration required by the Act of 25 Car. 2. made for preventing of dangers by Popish Recusants; and in his Office by that Act was void to all intents and purposes before he made this Return of the Jury.

But this Challenge was disallowed by the Court; for he must be taken here as a Sheriff de facto; and if such a Challenge should be allowed, no Trial could be had, but should be put off, unless the party were ready to shew that the Sheriff had taken the Test.

In 1 Cro. 369. *Hore versus Brome*, a Challenge was made, that the Sheriff which Returned the Jury had a Writ of Discharge before he made the Return, and it was disallowed by the Court as contrary to the Record.

Rashly

Rashly *versus* Williams.

Trin. 4 Jac. Rot. 730.

PLACITA apud Westm' coram Edwardo Herbert Mil', & Sociis suis Justic' Domini Regis de Banco; De Termino Sanctæ Trinitatis, anno regni Domini nostri Jacobi Secundi, Dei gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei defensor, & Quarto. Rot. 730.

Covenant
against an
Attorney, upon
Articles of
Agreement for
quiet enjoyment
of Lands.

Alias prout patet Termino Paschæ ult' præterit' Rot. DCXLVIII. continetur sic Memorandum, quod secundo die Maij isto eodem Termino ven' hic in Cur' Jonathan' Rashleigh Armig', per Carolum Dymock Attorn' suum, & exhibuit Justic' Domini Regis hic quandam Billam suam versus Humfridum Williams Gen', un' Attorn' Cur' Dñi Regis de Banco hic præsent' hic in Cur' in propria persona sua de Placito conventionis fract' cujusquidem Billæ tenor sequitur in hæc verba: Justic' Dom' Regis de Banco, *Cornub.* s. Jonathan' Rashleigh Ar', per Carolum Dymocke Attorn' suum, queritur de Humfrido Williams Gen', un' Attorn' Cur' Domini Regis de Banco hic præsent' hic in Cur' in propria persona sua de Placito, quod cum per quosdam Articulos Agreement' fact' sexto die Aprilis, anno Domini Millesimo sexcentesimo octogesimo quinto, apud *Lanceston* in Com' prædict', inter prædict' Humfridum Williams, per nomen Humfrid' Williams de *Burgo de Bodmyr* in Com' *Cornub'* Gen', pro & ex parte cujusdam Thomæ Manning de *London'* Gen', ex una parte, & eundem Jonathanum, per nomen Jonathani Rashleigh de *Menabilly* in Com' prædict' Armig', ex altera parte, fact' quor' quidam Articuli unam partem sigillo prædict' Humfr' signat', idem Jonathan' hic in Cur' profert cujus dat' eisdem die & anno testat' existit: Imprimis concludat' & agreeat' fuit inter partes prædict', Quod idem Jonathan' Rashleigh pro Considerat' in Articulis prædict' postea express. quiete & pacifice haberet, teneret, occuparet, possideret & gauderet Tenementum vocat' le *Saltmarsh*, & *Marsh Parke*, cum pertin' scituat', jacen' & existen' in paroch' de *Tywardreth* in Com' prædict' (pro Termino unius anni integri) à Vicesimo quinto die Martij, tunc ult' præterit' & plenar' complend' & finiend' (except' è dimissione prædict') cuidam Edwardo Knollis nuper tenen' præmissorum unum parvum clausum parcell' præmissorum tunc arat' (Anglicè, *Culted*) usque & post tempus messonis & asportationis grani abinde, per prædict' Edward' Knollis. Item concludat' & agreeat' fuit inter partes prædict', quod prædict' Jonathan' Rashleigh solveret seu solvi causaret pro tenemento prædict' summam viginti librarum legalis *Anglicanæ* monetæ, per quaterial' solutiones maxime usual' in anno. Item concludat' & agreeat' fuit inter partes prædict', quod prædict' Jonathanus Rashleigh ad finem termini prædict'

Ex parte of
another.

Profert in
Curia.

The Articles
set forth.

Entry of the
Plaintiff.

The Plaintiff
avers perfor-
mance of all
the Covenants.

The Breach
assigned.

The Defendant
(and his Ser-
vants) sued in
an Action of
Trespas in the
Common Pleas.

Damages reco-
vered against
them.

And the Plain-
tiff compelled
to pay them.

furfum redderet tenementum prædict' bene reparat' & in tam bona conditione, quam idem Jonathan' tunc inveniebat tenementum prædict', prout per Articulus prædict' plenius apparet; Virtute quorum quidem Articulorum idem Jonathan' postea, scilicet, nono die Aprilis, anno Domini Millesimo sexcentesimo octogesimo quinto supradicto in tenementum prædict' cum pertin', (except' præexcept') intravit & fuit inde possessionat': Et idem Jonathan' dicit, quod licet ipse à tempore consecutionis Articulorum prædict', usque finem termini prædict', omnia & singula conventiones & agreamenta in Articulis prædict' superius specificat', ex parte ipsius Jonathan' performand' & perimplend', bene & fideliter performavit & perimplevit, secundum vim formam & effectum Articulorum prædict' in facto idem Jonathan' dic', quod prædict' Jonathan' post consecutionem Articulorum, scilicet, decimo quinto die Aprilis, anno Domini Millesimo sexcentesimo octogesimo quinto supradicto intravit in tenementum prædict' (except' præexcept') per se & servos suos, videlicet Arthorum Harris, Johannem Williams & Petrum Kittoe, & posuit averia sua, videlicet, equos, equas, boves, vaccas, oves, porcos & bidentes suos in tenementum prædict' (except' præexcept') & herbam ibidem crescent' cum averiis ipsius Jonathan' prædict' depast' fuer' conculcaver' & consumpser': Ac superinde prædict' Edwardus Knollys pro intratione & depasturatione prædict' postea & ante finem prædict' termini unius anni, scilicet, Termino Sanctæ Trinitatis, anno regni Domini Regis nunc primo, in Cur' ipsius Domini Regis de Banco (eadem Cur' apud Westm' in Com' Midd' existen') implacitavit & prosecut' fuit ipsum Jonathanum, & prædict' Arthorum Harris, Johannem Williams & Petrum Kittoe, servos suos in placito Transgr' pro prædict' intratione & positione averiorum suorum prædict' in tenementum prædict' (except' præexcept') & herbam prædict' ibidem crescent' cum averiis prædict' depascent'. Taliterque in eadem Cur' postea super placito illo pcess. fuit, quod per eandem Cur' cons' fuit, quod prædict' Edwardus, recuperet versus prædict' Jonathanum, Arthorum, Johannem & Petrum viginti libr' pro dampnis, quæ prædict' Edwardus sustinuit occasione Transgr' illius, necnon septemdecim libr' quæ prædict' Edwardo adjudicat' fuer' p misis & custagiis suis per ipsum circa sectam suam in ea parte apposit', quæ quidem dampna in toto se attingebant ad triginta & septem libras; Et quod prædict' Jonathan', Arthurus, Johannes & Petrus capiantur &c. put per Record' & Process. inde in eadem Cur' de Banco hic remanen' plenius liquet & apparet, Quas quidem triginta & septem libr'; idem Jonathan' postea, scilicet, Vicefimo die Januarii, anno regni dicti Domini Regis nunc Secundo apud *Lanceston* præd', prædicto Edwardo solvere & satisfacere, coactus & compulsus fuit, idemque Jonathan' diversas denar' summas, videlicet, duodecim libr' in defensione Sectæ prædict', prædicto Humfrido solvit, erogavit & exposuit. Et sic idem Jonathan' dic',
Quod

Quod ipse non quiete & pacifice tenuit, habuit, possedit & gavisus fuit tenentum predictum, secundum conventionem predictam, predicti Humfridi, sed fuit sectatus, disturbatus & molestatus, & dampna predicta ex causa predicta, modo & forma predicta recuperat proinde solvere coactus fuit, videlicet, apud *Lanceston* predictum in Comitatu predicto; unde dicitur, quod deterioratus est & dampnum habet ad valentiam sexaginta librarum. Et inde producit sectam, &c.

Et predictus Humfridus in propria persona venit & defendit vim & injuriam, &c. Et dicit, quod ipse non infregit Conventionem predictam modo & forma predicta, prout predictus Jonathan superius versus eum queritur. Et de hoc ponit se super Praesentiam. Et predictus Jonathan similiter &c. Ideo Praeceptum est Vice quod Venire faciat hic die Mercurii proximo post tres Septimanas Sanctae Trinitatis duodecim, &c. per quos, &c. Et qui nec, &c. Ad recordandum, &c. Quia tam, &c.

Et se non quiete & pacifice tenuit.
Non infregit Conventionem pleaded.
Note, This Plea is good after a Verdict; but it had been naught upon a Demurrer.

Rashly versus Williams.

IN an Action of Covenant the Plaintiff declared upon certain Articles of Agreement made between the said Williams (for and on behalf of Thomas Manning of London, Gent.) of the one part, and the said Rashley of the other part; whereby it appeared that it was agreed between the Parties, that the said Rashley quiesce & pacifice haberet, teneret, occuparet, possideret & gauderet Tenement vocat *Le Saltmarsh* &c. for the term of one year, Except de dimissione predicta cuidam *Edwardo Knollis* nuper tenent premissorum unum parvum clausum parcellam premissam. And it was further agreed, that the said Rashley should pay Twenty Pounds by Quarterly payments for the said year.

And the Plaintiff sets forth, that he entered into the Premises and put in his Cattle, and that before the year was out the said Edward Knollis sued the said Rashley in an Action of Trespass for entering into the Premises, and putting in of his Cattle, &c. and in that Action he recovered Twenty pounds Damages against him, and Seventeen pounds Costs, which he was forced to pay, and was put to the Expence of Twelve pounds more in defence of the Suit, and so he did not hold the Premises quietly, but was sued and disturbed, and compelled to pay as aforesaid.

The Defendant pleaded, that he did not break his Covenant. And upon that Issue was joyned, and found for the Plaintiff.

It was moved in Arrest of Judgment, that it did not appear that Knollis sued upon any Title; which should have been set forth.

Levin

Levins for the Plaintiff Argued, That it was not necessary to set forth the Title of Knollis, because this was a Covenant for the quiet enjoyment of the possession; and for that cited Dyer 128. where the Covenant was, That he should enjoy 'absque interruptione alicujus; and so is 1 Roll Abr. 430.

Again, This is a Collateral Agreement by a Stranger to the Land, and no Lease. 'Tis no more than a Covenant by a Stranger, that he shall quietly enjoy the Land, and that shall be construed strongest against him to extend to any disturbance whatsoever.

And he urged further, that this Disturbance was by Edward Knollis, and he was mentioned in the Articles; and so it seems a Covenant against a particular person, and that goes to any disturbance, whether upon Title or otherwise.

But it was Resolved by Powel and Ventris, (the Chief Justice being absent, and Rokeby doubting) that the Declaration was insufficient, in regard it was not set forth that Knollis had any Right; for the Articles did amount to a Lease, tho' by a Stranger, for he acted in behalf of the Owner of the Land, and it shall be taken he had an Authority to demise, and it appears they intended it a Demise; for that part excepted is mentioned to be *dimissione prædicta*: But if it were a Collateral Covenant by a Stranger, it would be hard to extend it to a Tortious Entry. A Collateral Warranty given by a Stranger, extends only to Titles present.

In the Case of Wotton and Hele in the 2 Sand. 177. it was set forth, that J. S. entered *Habens legale Titulum*; and that was held naught after a Verdict, because not expressly set forth to be an ancient Right. The Case cited in Dyer seems to go upon the words, *Absque interruptione alicujus*. See for that Hob. in Telsdale and Essex's Case, and as 'tis cited by Rolls Abr. the 1st part 430. and Vaughan 118. Hayes and Bickerstaff. Vid. 3 Cro. 373, 436. Cro. Jac. 425. where the Promise was to enjoy without the Interruption of any person, and yet held that a Title ought to be set forth. This is no Covenant expressly against Knollis, for he is only mentioned for the part excepted, and to have been Tenant of the Premises; and so in the principal Case Judgment was stayed.

Blisse versus Frost.

London II. **W**illielmus Frost nuper de *London* prædict', Felt-
 maker, attach' fuit ad respondend' Richardo Blisse
 de placito *Transgr' super Casum*, &c. Et unde idem Richardus
 per Willielmum Eyre Attorn' suum Queritur quare cum quidam
 Josephus Fisher primo die Aprilis, anno regni Domini Jacobi Secundi
 nuper Regis *Angliae*, &c. Tertio, apud *London* in Parochia Beate
Mariae de Arcubus in Warda de *Cheape*, possessionat' fuisset de
 quidusdam bonis & catallis, videlicet, de doce[m] Doliis, Vini Helvici
 (Anglicè vocat' *Hogheads of Claret*) quinque Cadis, Vini His-
 panic' (Anglicè, *Pipes of Canary*, & uno Vase (Anglicè, *Wine*)
 Vini Hispanici (Anglicè, *Canary*) ad valentiam Ducentarum
 & undecim librarum; ut de bonis & catallis suis propr', & sic
 inde possessionat' existen' idem Josephus bona & catalla prædict'
 postea apud *London* prædict', in Parochia & Warda prædict', extra
 manus & possessionem suas Casualit' perdidit & amisit; Quæ qui-
 dem bona & catalla postea, scilicet, Vicesimo die Aprilis, anno regni
 dicti Domini nuper Regis Tertio supradicto, apud *London* prædict',
 in Parochia & Warda prædict' ad manus & possession' ipsius Wil-
 lielmi Frost per Inventionem devener'; Cumque etiam prædict'
 Josephus existen', Subdit' natus hujus Regni *Angl'* prædicto Vicesimo
 die Aprilis, anno Tertio supradicto, & per spatium Trium annorum
 & amplius antea elaps' & diu postea apud *London* prædict', in
 Parochia & Warda prædict', exercebat artem sive myster' Camponis
 (Anglicè, of a *Wintner*) & per totum idem tempus querebat
 victum & vivend' facultat' suam (Anglicè, *did seek and endeavour*
to get his Living) per viam emend' & vendend' in arte sive myster'
 prædict' Camponis (Anglicè, of a *Wintner*) prædictusque Josephus
 artem sive myster' prædict' sic exercend' & victum suum, & vivend'
 facultat' per viam emend' & vendend' in arte sive myster' prædict'
 Camponis (Anglicè, of a *Wintner*) querend' adtunc & ibidem
 indebitat' devenit & adhuc indebitat' existit eidem Richardo &
 diversis al' personis Creditor' prædict' Josephi, similiter existen'
 Subdit' nat' hujus Regni *Angl'*, in diversis & separalibus denar'
 summis legalis moner' *Angl'*, in toto se attingen' ad summam Mille
 librarum & amplius; Cumque etiam idem Josephus (prædict'
 sepeal' denar' summis eidem Richardo & al' Creditoribus prædicti
 Josephi minime solut' sive satisfact' existen') postea, scilicet, Vice-
 simo quinto die Aprilis, anno Tertio supradicto, apud *London* prædict'
 in Parochia & Warda prædict' seipsum absentavit & recessit (Anglicè,
did depart) a domo mansional' sua ea intentione ad defraudand' ipsum
 Richardum & ceteros Creditor' ipsius Josephi de veris & justis
 debitis suis prædict'; & idem Josephus eodem Vicesimo quinto die
 Aprilis

Trove by an
 Assignee of
 Commissioners
 of Bankrupts.

The Bankrupt
 possided.

Vessel.

They came to
 the hands of
 the Defendant.

The Bankrupt
 exercised the
 Trade of a
 Vintner.

And became
 Indebted to
 several persons.

And went from
 his House.

And became
Bankrupt.

The Creditors
Petition the
Lord Chan-
cellor.

The Commis-
sion sued out.

Aprilis, anno Tertio supradicto, apud *London* prædict', in Parochia & Warda prædict' manifeste devenit Decoctor (Anglicè, a Bankrupt) infra veram Intentionem diversorum Statutorum versus Decoctores edit' & provis' Cumque etiam postea, scilicet, Vice-simo octavo die Aprilis, anno Tertio supradicto, apud *Westm'* in Com' *Midd'*, ad Petitionem prædict' Richardi, tam pro seipso quam pro omnibus aliis Creditor' prædicti Josephi Præhonorab' Georgio Domino Jeffreys, Baroni de Wem, Domino Cancellar' *Angl'*, apud *Westm'* prædict' in Com' prædicto, in Scriptis secundum formam Statut' in hujusmodi Casu edit' & provis' exhibit' & fact' pro remediis suis versus præfat' Josephum existen' Decoctor' in hac parte habend', eidem Richardo, & cæteris Creditor' prædict' Josephi de separalibus ~~dispositis~~ sic prædict', ut supradict' est minime solut' aut satisfact' existen' Quædam Commissio dicti Domini nuper Regis super eadem Statut' contra Decoctor' edit' & provis' sub magno Sigillo ipsius Domini nuper Regis *Angl'* sigillat' Et in Cur' Cancellar' dicti Domini nuper Regis de Recordo Irrotulat' emanavit versus præfat' Josephum geren' dat' apud *Westm'* prædictam, prædicto Vice-simo octavo die Aprilis, anno regni dicti Domini nuper Regis Tertio, quibusdam Johanni Cressett Armig', Georgio Evans Armig', Johanni Cole, Roberto Wilkinson, & Johanni Weaver gen', honest' & discret' person' per præfat' Domin' Cancellar' *Angl'* Commissionar' nominat' & appunctuat' direct' (Quæ quidem Commissio adtunc & ibidem eisdem Johanni Cressett, Georgio Evans, Johanni Cole, Roberto Wilkinson & Johanni Weaver, deliberat' fuit) Per quam quidam Commissionem dictus Dom' nuper Rex, dedit plenam potestatem & autoritat' prædict' Johanni Cressett, Georgio Evans, Johanni Cole, Roberto Wilkinson & Johanni Weaver, quatuor vel tribus eorum, quorum præfat' Johannem Cresset vel Georgium Evans, un' esse voluit juxta Statut' prædict', non solum concernen' dict' Decoctor' Corpus ejus Terras, Tenementa, Libera & Customar', Bona, Debita sua, & al' res quascunque, verum etiam concernen' omnes eorum personas, quæ per concealament' vel alit' offendifsent seu offenderent (Anglicè, did o? should offend) tangen' præmissa, vel aliquam partem inde contra verum sensum & intentionem in Statut' prædict', seu aliqua eorundem ad faciend', & exequend' omnes & singulas rem & res quascunque tam pro & erga satisfactionem & solutionem dictorum Creditorum, quam erga & pro omnibus aliis Inventionibus & propositis secundum ordinem & provisionem Statut' prædict'; ac idem Dominus nuper Rex per eandem Commissionem voluit & in mandat' dedit dictis Commissionar' quatuor vel tribus eorum, quorum præfat' Johannem Cressett vel Georgium Evans, un' esse voluit ad procedend' in executionem & complementum Commission' prædict', secundum Statut' prædict', cum omni diligentia & effect' prout special' fiducia ejusdem Domini nuper Regis fuit in eos reposit', prout per eandem Commission' (inter alia) plenius apparet virtute

Virtute cujus quidem Commission' præfat' Johannes Cresset Georgius Evans Robertus Wilkinson & Johannes Weaver quatuor Commissionar' præd' in Commissione præd' nominat' postea scilicet prædicto vicesimo octavo die Aprilis Anno tertio supradicto apud London' prædict' in Parochia & Warda prædict' convener' ad Commission' præd' in debito modo exequend'. Qui quidem Commissionar' ult' mentionat' sic convent' adtunc & ibidem super debitam examinationem Test' & al' sufficien' probacon' super Sacrament' coram eisdem Commissionar' ult' mentionat' capt' invener' qd' præd' Josephus conat' fuisset victum suum querere & adipisci in emend' & vendend' in arte sive mysterio Cauponis (Anglicè, of a Wintner) per spacium trium annorum & amplius insimul tunc ult' præterit' ante dat' & prosecution' Commission' ac indebitat' deven' præfat' Rich' & diversis al' personis Creditor' prædict' Josephi in diversis & sepealibus denar' summis attingen' ad summam mille librarum & amplius legalis monet' Angliæ. Et sic sepealiter indebitat' existens ut supradict' est qd' ipse præd' Josephus ante dat' & emanation' Commission' præd' devenisset decoctor ad omnes intention' & proposit' infra circuitum & veram intention' sepeal' Statut' præd' in Commission' præd' mentionat' sive eorum alicujus. Cumque etiam præfat' Johannes Cresset Georgius Evans Robertus Wilkinson & Johannes Weaver quatuor Commissionar' præd' virtute Commission' ill' & vigore Statut' præd' pro meliori remedio Creditorum prædict' post maturam deliberation' superinde capt' postea scilicet decimo octavo die Martii Anno tertio supradicto apud London' prædict' in Parochia & Warda prædict' per quandam Indenturam suam assignation' int' eisdem Commissionar' per nomen Johannis Cresset Armig' Georgii Evans Armig' Rob' Wilkinson & Johannis Weaver Gent' ex una parte & prædict' Rich' per nomen Rich' Blis de Parochia Sanct' Salvator' Southwark in Com' Surry Mercatoris un' Creditorum Josephi Fisher de Parochia Sancti Olavi Southwark in die Com' Surr' Cauponis ex altera parte fact' cujus quidem Indentur' un' partem sigillo eorundem Johannis Cresset Georgii Evans Rob' Wilkinson & Johannis Weaver sigillat' idem Ricardus hic in Cur' profert cujus dat' est eisdem die & anno ult' supradictis pro Consideratione in eadem Indentur' specificat' præd' decem Dolia vini Helveti quinq; Cados Vini Hispanici & un' Vas' (Anglicè, ~~Wine~~) Vini Hispanici (int' alia) assignaver' habend' & recipiend' eidem Rich' Executor' Administrator' & Assign' suis imperpet' in fiducia pro beneficio ipsius Rich' & omni al' Creditorum præfat' Josephi qui antetunc petiissent aut' postea debito tempore peterent auxilium per Commission' præd' & contribuer' erga custag' ejusdem Commission' secundum direction' & limitation' Statut' præd' prout per Indentur' ill' plenius apparet per quod & vigore Statut' præd' eadem decem Dolia Vini Helveti quinq; Cadi & un' Vas' Vini Hispanici prædict' Rich' spectarent & pertiner' Unde prædict' Will' Frost adtunc & ibidem notitiam habuit prædict' tamen

The Commissioners find him a Bankrupt.

And make Assignment to the Plaintiff.

Then he lays a
Conversion in
the Defendant.
Then he lays a
General Action
of Trover for
the same goods.

Will' Frost sciens præd' decem dolia Vini Helvoli quinq; Cados & un' Vas Vini Hispanici fuisse Bon' & Catalla præd' Rich' propr' & ad ipsum Rich' spectare & pertinere sed machinans & fraudulentur intendens ipsum Rich' de eisdem callide & subdole decipere & defraudare eadem decem dolia Vini Helvoli & quinq; Cados & un' Vas Vini Hispanici (licet sæpius requisit') eidem Rich' non deliberavit sed eadem adtunc & ibidem ad usum suum propr' convertit & disposuit Cumq; eciã idem Rich' postea scilicet tricesimo primo die Maii anno tertio supradicto apud London' præd' in Parochia & Warda prædict' possessionat' fuisset de diversis al' bonis & catallis sequen' videlicet de decem al' Doliis Vini Helvoli (Anglice vocat' *Hogheads of Claret*) quinq; al' Cadis Vini Hispanici (Anglice, *Pipes of Canary*) & un' al' vase (Anglice, *Ullage*) Vini Hispanici (Anglice, *Canary*) ad valentiam al' ducentarum & undecim librarum ut de bonis & catallis suis propr' Et sic inde possessionat' existens idem Rich' bona & calla illa extra manus & possessionem suas casualit' perdidit & amisit Quæ quidem bona & catalla ult' mentionat' postea scilicet eodem tricesimo primo die Maii anno tertio supradicto apud London' præd' in Parochia & Warda præd' ad manus & possession' præd' Will' Frost per inventionem devener' præd' tamen Will' Frost sciens præd' decem Dolia Vini Helvoli quinq; Cad' & un' Vas Vini Hispanici ult' mentionat' fuisse bona & catalla prædict' Rich' propr' & ad ipsum Rich' de jure spectare & pertinere ac machinans & fraudulent' intendens ipsum Rich' de eisdem callide & subdole decipere & defraudare eadem decem Dolia Vini Helvoli quinq; Cados & un' Vas Vini Hispanici ult' mentionat' (licet sæpius requisit') eidem Rich' non deliberavit sed eadem adtunc & ibidem in usum suum propr' convertit & disposuit Unde idem Rich' dic' qd' deteriorat' est & dampnum habet ad valentiam ducentarum & quinquaginta librarum Et inde produc' Sectam, &c.

The Defendant
Demurs.

Et præd' Will' per Zach' Blunt Attorn' suum ven' & defend' & injur' quando, &c. Et dic' qd' Narratio prædict' materiaq; in eadem content' minus sufficiens in lege existunt ad prædict' Rich' actionem suam prædict' versus præfat' Will' habend' manutenend' Qd'q; ipse ad narration' ill' necesse non habet nec per legem terræ tenetur respondere & hoc parat' est verificare Unde pro defectu sufficien' Narration' idem Will' pet' Judic' & qd' prædict' Rich' ab actione sua præd' habend' præcludatur, &c.

The Plaintiff
joyns in Demurrer.

Et præd' Rich' ex quo ipse sufficiens materiam in lege ad prædictum Rich' actionem suam præd' versus ipsum Will' habend' manutenend' superius narrando allegavit quam ipse parat' est verificare Quam quidem materiam præd' Will' non dedic' nec ad eam aliquatit' respond. sed verificationem ill. admittere omnino recusat pet. judicium & dampna sua occasione præmissa sibi adjudicari, &c. Et quia Justic. hic se advisare volunt de & super præmissis prædictis priusquam Judicium inde reddant dies dat. est partibus prædictis hincq; in crastino

crastino Sanctæ Trinitatis de audiend. inde iudicio suo eo qd. iidem Justic. hic inde nondum, &c.

Blesse versus Frost.

In a Trover and Conversion brought by the Plaintiff as Assignee of Commissioners of Bankrupts, amongst other things he declared that he was possessed de uno Vase (Anglicè, Vessel) Vini Hispanici, and it was objected upon a Demurter to the Declaration, that it was not said what the Vessel was made of, and so no measure for the Damages, sed non allocatur, for it is intended to be made of Wood, as is used for Casks of Wine.

Baynton versus Bobbert.

In an Action of Covenant brought in this manner, (viz.) by Henry Baynton and the Lady Anne his Wife, the Lady Elizabeth Wilmot and the Lady Mallet Wilmot, against Robert Bobbert. The Plaintiffs declared, that whilst the Lady Anne was sole by a certain Writing, bearing Date the 20th day of March in the year of our Lord 1684. sealed by the said Robert and produced in Court; it was agreed with the said Robert for and on the behalf of the said Ann, Elizabeth and Mallett, Daughters and Coheirs of the Right Honourable John late Earl of Rochester, for the passages of all Boats and other advantages of Navigation upon the River made navigable by John Mallett Esq; deceased Grandfather of the Right Honourable Elizabeth late Countess of Rochester, from the Bridge of Bridgewater, to a certain place upon the River aforesaid, called Ham Mills (the benefit of which River aforesaid was granted to the said Ann, Elizabeth and Mallett by the Letters Patents of the Late King, bearing date the last year of his Reign, with power to chain up a Bridge made by the said John Mallett near the place in the said River called Knapps Bridge, or any other place of the River aforesaid, granted to the said Ladies as aforesaid) with power also to sue or implead in the name of the said Ladys any Person passing with Boats upon the said River without the licence of the said Robert first had and obtained, he taking for every Boat that should pass below the said Knapp Bridge, one Shilling. To have and to hold the benefit of the Passage aforesaid to him, his Executors and Assigns from the 25th of March next after the date of the said Writing, for three years, yielding and paying for the same yearly during the Term, to the said Ann, Elizabeth and Mallett Wilmot the Rent of 45 l. at Michaelmas and our Lady Day, by equal portions.

The Plaintiffs further say, That altho' he the said Robert had occupied and enjoyed the Passage and Premises aforesaid, the said Robert did not pay to the said Ann, Elizabeth and Mallett whilst the said Ann was sole, nor to the said Henry, Ann, Elizabeth and Mallett, after the Marriage of the said Ann, or to any of them, the said Rent of 45 l. or any part thereof; and so the said Robert did not perform his Covenant, but broke the same ad dampnum, &c.

The Defendant pleaded protestando, That there was no such Grant made by the King, and protestando that the said River was not made Navigable by the said John Mallett, Pro placito, That the said River from the said place called Bridgewater-Bridge to the said place called Ham Mills, supposed and pretended to have been made Navigable as aforesaid, is, and for time out of mind hath been an ancient and Navigable River, free and common for all the Kings Subjects to pass with Boats. And further saith, That the aforesaid Ann, Elizabeth and Mallett Wilmott at the time of the making of the said Writing, or at any other time had nothing of passage of Toll in the River aforesaid, whereof they could make any Demise or Grant to the said Robert, per quod the said Robert could not have, take or receive the advantage and profit aforesaid, according to the purport of the said Writing, but was wholly deprived thereof during all the time aforesaid, & hoc paratus est verificare, and so demands Judgment, Si Actio.

To this the Plaintiffs demurred, for that the Plea was double, and that no Traverse was to the enjoyment, which were the Causes specially assigned for Demurrer.

Pollexfen Chief Justice, Powell and Rokeby held the Plea to be double.

Ventris, contra. For it is all but one matter, for if the River were free for all the Kings Subjects to pass, then the Plaintiffs could have no Toll, or make any obstruction thereupon, so that one matter depended upon the other, and in such case a Plea shall not be said to be double. Calf and Nevill Poph. 186. In a Scire facias against the Bail, the Defendant pleaded, That the Principal rendered himself to Prison before the Scire facias, and died in Prison; either of these matters would have served, and yet the Plea not held double. But all the Court resolved that the Plea was insufficient to bar the Plaintiffs.

First, Because it was set forth in the Declaration, that the Defendant had enjoyed the Passage and Profit granted, and then the Rent must be paid so long; if an eviction be pleaded in bar to Rent it must be Rent grown due after the eviction, 20 H. 6. 22. if a Disseisor lets, rendering Rent, and the Disseisor enters after the Rent-day, yet an Action of Debt lies for the Rent accrued before, therefore the Defendant should have traversed the enjoyment. Again,

Again, This is not a Rent, for 'tis reserved out of a thing Incorporeal, and an express Covenant to pay it. The Mayor and Commonalty of London against Hatton, Sty. 357. upon a Lease of the Barbers Office, a Covenant was brought for the Rent, and pleaded that it could not be let, but it does not appear by the Book that Judgment was given, Vid. Newton & Weeks, Allens Rep. 79. One reciting that he was seised of such Land, granted a Rent out of it, and covenanted to pay the Rent. he could not plead to his Covenant that he had nothing in the Land.

Judgment pro Quer'.

Bockenham versus Thacker.

ALIAS prout patet Termino Paschaz ult' præterit' Rotulo Sexcentesimo octagesimo continetur sic Memorandum quod Vicesimo octavo die Maij isto eod' Termino venit hic in Cur' Hugo Bockenham per Robert' Snell Attorn' suum & exhibuit Justic' Domini Regis hic quendam billam suam versus Pet' Thacker sen' un' Attorn' Cur' Domini Regis de Banco hic præsentem hic in Cur' in propria persona sua de placito Transgr' super Casum cujus quidem Billæ tenor sequitur in hæc verba Justic' Domini Regis de Banco hic Norf. ff. Hugo Bockenham per Robertum Snell Attorn' suum queritur de Petro Thacker generoso uno Attorn' Cur' Domini Regis de Banco hic præsentem hic in Cur' in propria persona sua pro eo videt' quod cum quidam Thomas Seely indebitat' fuisset eidem Hugoni in quadam pecunie summa exceden' duodecim libras Cumque etiam prædictus Petrus (ut ipse dixit) indebitat' fuisset præfat' Thomæ Seely in duodecim libris aut eo circit' prædictus Petrus quinto die Septembris anno regni Domini Jacobi Secundi nuper Regis Angl' Tertio apud Hethersett in Consideratione quod idem Hugo ad specialem instantiam & requisitionem prædict' Petri procuraret ordinem prædict' Thomæ Seely in scriptis sub manu sua præfat' Petro pro solutione denarior' quos idem Petrus dicto Thomæ debuit aut alicujus partis earundem eidem Hugoni super se assumpsit & eid. Hugoni adtunc & ibidem fidelit. promisit quod ipse prædictus Petrus denar. illos vel aliquam partem inde juxta hujusmodi ordinem bene & fidelit. solvere & contentare vellet Et idem Hugo in facto die qd. ipse permissioni & assumptioni prædict. Petri prædict. fidem adhibens postea scilicet prædicto quinto die Septembris anno tertio supradicto apud Hethersett prædictam procuravit Ordinem prædicti Thomæ Seely in scriptis sub manu & nomine ipsius Thomæ Seely subscript. & præfat. Petro direct. dictusq; Thomas perinde requisivit ipsum Petrum super visum Ordinis sive not. illius ad solvend. eid. Hugoni vel ejus ordini quinq; libras & ad collocand. easdem ad comporum ipsius Thomæ Seely idemq; Hugo postea scilicet eisdem die & anno ibidem ostendebat præfat. Petro ordinem & notam ill.

A Special Indebitatus Assumpsit against an Attorney.

One J. S. was indebted to the Plaintiff in a certain sum of Money not exceeding 12 l. The Defendant was indebted to the said J. S. in 12 l. and so circiter. The Defendant, promises that if the Plaintiff would procure a Note under the hand of J. S. for payment of the Money which he owed J. S. or any part thereof, that then he would pay the Plaintiff. The Plaintiff avers that he procured such Note. And shewed it to the Defendant. &

And requested
him to pay him
the Money.

But he refused
payment.

Then he lays it
another way.

& eum requisivit ad solvend' sibi dicto Hugoni easdem quinq; libras prædictasq; Petrus adtunc & ibidem habuit visum Ordinis & notæ ill' prædictus tamen Petrus promission' & assumption' suas prædictas minime curans sed machinans & fraudulent' intendens ipsum Hugon' in hac parte callide & subdole decipere & defraudare prædictas quinq; libras seu aliquem denarium inde licet sepius requisit' eidem Hugoni non solvit seu aliqualit' contentavit sed ill' ei hucusq; solvere omnino recusavit & adhuc recusat Cumq; etiam prædictus Hugo postea scilicet prædicto quinto die Septembris anno tercio supradict' apud Hetherfett præd' procurasset Ordinem cujusdam Thomæ Seely in scriptis sub manu & nomine ipsius Thomæ Seely subscript' & præfat' Petro direct' dictusq; Thomas perinde requisivisset prædict' Petrum super visum ordinis sive not' illius ad solvend' eidem Hugoni vel ejus ordinis quinq; libras & ad collocand' easdem ad compositum ipsius Thomæ ipse prædictus Petrus in consideratione inde postea scilicet vicesimo nono die Septembris anno tercio supradict' apud Hetherfett præd' super se assumpsit & eidem Hugon' adtunc & ibidem fidelit' promisit qd' ipse prædictus Petrus præd' quinq; libras ult' mentionat' eidem Hugon' cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet prædictus tamen Petrus promission' & assumption' suas prædictas ult' mentionat' minime curans sed machinans & fraudulent' intendens ipsum Hugon' in hac parte callide & subdole decipere & defraudare prædictas quinq; libras ult' mentionat' eidem Hugon' (licet adhuc per ipsum Hugon') vicesimo die Octobris anno tercio supradict' & sæpius postea apud Hetherfett prædict' requisit' fuisset non solvit seu aliqualit' contentavit sed ill' ei hucusq; solvere omnino recusavit & adhuc recusat ad dampnum ipsius Hugonis decem librarum Et inde petit remedium, &c. Pleg' de prosequend' Johannes Doe & Richardus Roe.

The Defendant
Implies.

Et prædictus Petrus in propria persona sua venit & defend' vim & injur' quando, &c. Et petit licenc' inde interloquendi hucusq; diem veneris prox' post crastinum Sanctæ Trinitatis & habet, &c. Idem dies dat' est præfat' Hugoni hic, &c. Et modo ad hunc diem scilicet diem Veneris prox' post crastinum Sanctæ Trinitatis venit tam præd' Hugo per Attorn suum prædict' quam prædictus Petrus in propria persona sua Et super hoc idem Hugopetit qd' prædictus Pet' ad Billam suam prædict' respondeat, &c. Et prædictus Petrus ut prius defend' vim & injur' quando, &c. Et dicit qd' narratio præd' modo & forma prædictis fact' ac materia in eadem content' minus sufficiens in lege existunt ad prædict' Hugon' action' suam præd' versus ipsum Petrum Habend' manutenend' qd'q; ipse ad narration' illam modo & forma prædict' fact' necesse non habet nec per legem terræ tenetur respondere & hoc parat' est verificare Unde pro defectum sufficien' narration' in hac parte idem Petrus petit Judicium Et qd' prædictus Hugo ab actione sua præd' versus ipsum Petrum habend' precludatur' &c.

And Demurs to
the Declaration.

Et

Et prædictus Hugo ex quo ipse sufficien^r materiam in lege ad action^r suam præd^r versus ipsum Petrum habend^r manutenend^r superius declaravit quam ipse parat^r est verificare quam quidem materiam prædictus Petrus non dedit nec ad eam aliquatim^r responder sed verification^r illam admittere omnino recusat petit Judicium & dampna sua occasione premissi sibi adjudicari, &c. Et quia Justic^r hic se advisare volunt de & super materia in narratione prædict^r specificat^r priusquam judicium inde reddant dies dat^r est partibus prædictis hic usq; diem martis prox^m post tres septiman^r Sancti Michael^r de audiend^r inde Judicio suo quod iidem Justic^r hic inde nondum, &c.

The Defendant
joins in De-
murer.

Bockenham versus Thacker.

In an Action upon the Case the Plaintiff declared, that J. S. was indebted in a sum of Money to the Plaintiff not exceeding 12 l. and that the Defendant (as he the Defendant said) was indebted to J. S. in 12 l. or there about.

That the Defendant in consideration, that the Plaintiff at his request would procure an Order from J. S. in writing to the Defendant for payment of the Money which the Defendant owed J. S. or any part thereof to the Plaintiff, he promised to pay the Money according to such Order.

The Plaintiff avers, that he procured such Order from J. S. for the Defendant to pay him 5 l. which he shewed to the Defendant, and the Defendant refused to pay, &c.

The Defendant demurs generally to the Declaration.

Levinz for the Defendant argued, that it was not sufficiently set forth, that the Defendant was indebted to J. S. and if not, there was no consideration.

Cur^r contra, for it must be intended that he was indebted, for 'tis set forth that the Defendant said so; but if not, the procuring the Note at the Defendants request by the Plaintiff was a sufficient consideration.

It was Objected further, that the Plaintiff had not alledged that he procured the Note at the request of the Defendant, as the agreement was, and for that 3 Leon. 91. was cited in consideration that he should repair such part of a House at his request; it was held naught for not laying the repairing to be done at request. Sed non allocatur, for it shall be intended to have been done at request; and so is Beeton and Boltons Case, 3 Cro. 246. 2 Cro. 404. Berisfords Case, and Poynters Case, 1 Cro. Sed Nota, All those Cases are after Verdict; and so is the above cited Case See more of this Case afterwards.

Termino

Termino Sancti Michaelis, Anno 1 W. & M.

In Communi Banco.

Serjeant Trinder moved the Court to set aside a Verdict recovered in an Action for the mess Profits after a recovery in an Ejectment, shewing that the Defendant in the Ejectment had brought another Ejectment since and recovered, so that the first recovery was disaffirmed, and therefore there ought to have been no recovery for the mess Profits; but the motion was denied by the whole Court.

Leigh versus Ward.

Debt upon a Bond, the Condition was to perform an Award, and the Defendant pleaded that the Arbitrator made no Award.

The Plaintiff replied, that after the Bond entered into, and before the time set in the Condition for making of the Award, scilicet tertio die Novembris, anno, &c. per quoddam Scriptum suum arbitr' adtunc & ibidem fact', &c. and so sets forth the Award, upon which the Defendant demurred, because no place was mentioned where the Award was made.

Tremain for the Plaintiff said, that the adtunc & ibidem should refer to the place mentioned in the Declaration where the Bond was made.

Cur' contra, The adtunc & ibidem cannot be referred to the place in the Declaration, and there is no place mentioned in the Replication. Whereupon Judgment was given for the Defendant.

Memorandum, Mr. Justice Eyres came to this Court at the desire of the Court of Kings Bench, who were trying of a Cause at the Bar, to know the Opinion of the Court of Common Pleas upon this Question, An Infant who was a party to the Ejectment that was upon trial, had answered a Bill in Chancery by his Guardian, whether that Answer could be read in Evidence against the Infant: And the Opinion of the whole Court was, that it could not be read, for it is not reason that what the Guardian swears in his Answer should affect the Infant.

Blake

Blake versus Clattie.

Trespass Quare clausum fregit & diversa onera equina of
Gravel, had carried away per quod viam suam amisit.

After Verdict it was moved in Arrest of Judgment, that the
diversa onera equina was uncertain, and then mentioned the loss
of his Way, and had set forth no Tide to the Way, nor set forth
any certainty of it.

It was said on the other side, that the Incertainty was aided by
the Verdict, and the other Matter about the Way was only laid
in aggravation of Damages.

But the Court held the Exceptions material, and thought it
would be very inconvenient to permit such a Fog of putting in
of a Way to a Declaration in Trespass.

Anonymus.

In an Action of Debt for Rent, the Plaintiff declared in Michael-
mas Term last, and laid the Demise to be Anno primo Jacobi
Secundi Regis.

The Defendant pleaded Nil hab' in Tenementis, and the Plaintiff's
Attorney delivered a Copy of the Issue where the Demise was laid
Anno primo Regis nunc, and so the Nisi prius Roll was at first;
but it was observed that the Plaintiff's Attorney had amended it, but
gave no Notice thereof to the Defendant's Attorney, nor delivered
him a new Copy of the Issue, and so went to Trial, which proceeded,
the Nisi prius Roll being right, and a Verdict was found for the
Plaintiff.

And it was moved by Serjeant Rotheram, that there should be a
New Trial granted; for the Defendant was surprized to find the
Record right, when they had a wrong Copy of the Issue.

But it appearing to the Court, that the Defendant notwith-
standing proceeded in his Defence, and the Verdict was after a
long Evidence, that the Court would not set it aside, but ordered
the Plaintiff's Attorney to attend for the undue Practice in making
of an Amendment in such manner.

Bailes versus Wenman.

In an Ejectment upon a Special Verdict the Case appeared to be thus:

That Articles of Marriage were made between the eldest Son and Heir apparent of the Defendant and Martha, one of the Daughters of one William Nailor, whereby the Defendant was to settle the Lands in question upon the Lessor for his Life, and after his decease upon Martha for her Joynture, with a Proviso, that the Lessor should make a Lease of the Premises to the Defendant for 99 years, if the Defendant and Susan his Wife should so long live, and that Susan died before the Lease made to the Plaintiff. So the only Question was, Whether the Lease for 99 years determined by the Death of the said Susan.

The Court upon the first opening, without Argument, were all of Opinion, that it did determine, and Ordered Judgment to be Entered for the Plaintiff. 5 Co. 9. In Brudnell's Case, Daniel and Waddington, 2 Cro. 378. Vide Dyer 67. and 1 Inst. 225. a. Tappenny's Case. Vide Anderson 151. A Lease made to two for their Lives, absque imperitioe vasti durant vitis of the Lessees, and held that this Privilege would hold to the Survivor; for 'tis reasonable to give the Privilege as large a Construction as the Interest.

Bokenham versus Thacker.

Trin. 4 Jac. Secundi Rot. 1451.

The Plaintiff declared, That whereas one Thomas Seely was Indebted to him in a certain Sum of Money, amounting to above 12 l. And whereas the Defendant (as he said) was Indebted to the aforesaid Seely in 12 l. or thereabout. The Defendant in Consideration that the Plaintiff, at the Special Instance and Request of the Defendant, would procure an Order from the said Thomas Seely in Writing under his Hand, directed to the Defendant for the payment of the Money which the Defendant owed to the said Thomas Seely, or any part thereof.

The Defendant did promise to the Plaintiff, that he would pay the said Money, or any part thereof, according to the said Order, and sets forth, That he promissioni & assumptioni predictæ fidem adhibens, did procure an Order of the aforesaid Seely in Writing, directed to the Defendant, Requesting him upon sight of the Note, to pay to the Plaintiff or his Order, Five Pounds, and to place it to the Account of the said Thomas Seely: And the Plaintiff shew'd him

him the said Order at such a day and place, and Requested him to pay the said Five pounds, and that he did not pay, &c.

And upon this Declaration the Defendant demurred: And by Levins for the Defendant it was Argued,

First, That the Note is not alleged to be procured at the Request of the Defendant, (3 Leon. 91. Merry and Lewes) in Consideration that he would Repair an House at the Defendants Request he promised to pay; and alledgeth, that he Repaired; and it was held naught after Verdict for not saying, He Repaired at Request.

Secondly, This is not for a Duty to the Plaintiff, but Collateral, and became due upon a Special Promise; and therefore a Request ought to have been laid with Time and Place.

But both the Exceptions were Over-ruled, and Judgment by the whole Court was given for the Plaintiff. For when tis said to be agreed, That if he did procure at the Defendants Request a Note, there shall not be intended any Request to be meant, other than what was included in the Agreement. Otherwise, if the words had been to procure a Note when he should be Requested: But as this Agreement is, no subsequent Request was intended. See for that the Case of Bretton and Bolton in 1 Cro. 246. 1 Cro. Pointer's Case 194. and 2 Cro. 404. Berisford and Woodroffe.

As to the second Point, If a Demand be necessary in this Case, the whole Court were of Opinion, it was sufficiently laid, ut supra; (viz.) That at such a Day and Place he shew'd the Note, and Requested him to pay it; without saying, *ad tunc & ibidem*, Requested him to pay it; for all shall be intended done together.

Levins cited Hill and Wade's Case in the 2 Cro. 523. as to the Request.

Sed Nota, In that Case the Promise was to pay it upon Request: But here the Promise was not laid so in the Declaration; therefore I take it, no Request at all was necessary.

Chamberlain versus Cooke.

Suff. II. **R**obertus Cooke nuper de Bury Sancti Edmundi in Com' prædict' Carryer attach' fuit ad respondend' Johanni Chamberlain de placito Transgr' super Casum, &c. Et unde idem Johannes per Thomam Folkes Attorn' suum Queritur quod cum prædictus Robertus tertio die Octobris anno regni domini Jacobi Secundi nuper Regis Angl. Tertio & diu antea & continue postea abinde hucusque fuit & adhuc existit Communis Portator (Anglicè a Common Carryer) & per totum idem tempus usus fuit & consuevit per seipsum & servien' suos cum Equis & Plauistro

An Action upon the Case, upon the Custom of England, against a Common Carryer, for losing of Goods delivered him to carry.

The Difen-
is a Common
Carrier.

The Custom
of England.

The particulars
of the Goods
delivered to
him.

Wants (alii.)

Wants (alii)
there being
Pots and Can-
dlesticks before.

Uncertain.

Wants (alii.)

Wants (alii)
there being
Stoned Buttons
before.

Wants aliar.
Wants (alii.)

(Anglicè Waggon) ipsius Roberti Carriar' & portar' bona & catalla pro aliquibus personis huiusmodi carriacon' & portacon' requiren' pro rationabil' mercede & stipendio proinde solvend' ad ab & inter Bury Sancti Edmundi prædict' & Civitat' London' juxta agreement' & solucōn' in ea parte faciend' & habend' Cumque etiam secund' legem & consuetudinem huius regni Angliæ omnes huiusmodi Communes portatores qui bona & catalla aliquarum personarum huiusmodi carriacon' & portation' sic ut præfertur requiren' eis deliberat' existen' absque subtracōne spoliacione & amissione salvo ducere custodire & carriare debent & tenentur ita quod pro defectu vel pro default' talis Communis portatoris vel servien' suorum huiusmodi bona & catalla eis sic ut præfertur portand' & carriand' deliberat' non subtrahantur spolientur seu amittantur Cumque etiam prædictus Johannes prædicto tertio die Octobris anno Tertio supradicto apud Bury Sancti Edmundi prædict' possessionat' fuisset de bonis & catallis sequen' videlicet de duabus argenteis Crateris (Anglicè *Salters*) una alba Pelvi (Anglicè a *Basin*) quatuor Candelabris argenteis una patina pro emunctoriis (Anglicè a *Snuffet-pan*) un' par' argenteorum emunctoriorum (Anglicè a *pair of Snuffers*) sex culullis (Anglicè *Cumblers*) duobus poculis argenteis (vocat' *Ten-pots*) duabus seriebus (Anglicè *Sets*) argenteorum vasellorum (Anglicè vocat' *Casters*) quinque argenteis ignitabulis (Anglicè *Chaffing-dishes*) tribus argenteis pixidibus pro necotian' (Anglicè *Tobacco-boxes*) tribus coralliis cum scapis argenteis (Anglicè *Socket Toys*) tribus poculis argenteis (vocat' *Cans*) quatuor poculis moræ Japoniæ pictis (Anglicè *Japan Pots*) quatuor poculis argenteis undecim fallillis argenteis duabus laminis argenteis duobus discis argenteis (vocat' *Coffee Dishes*) uno poculo argenteo (vocat' a *Childs Pot*) uno candelabro argenteo (vocat' a *Hand Candlestick*) una argentea capula (Anglicè a *Ladle*) duobus cultris & furculis (Anglicè *Knives and Forks*) undecim unciis argenti format' in diversas argenteas nugas (Anglicè *Silver Toys*) duabus seriebus (Anglicè *Sets*) aurearum fibularum (Anglicè *Buttons*) septem annulis lapideis (Anglicè *Stone Rings*) quatuor deargent' thecis pro candelis (Anglicè vocat' *Gilt Sockets*) duobus fixidibus pro pulvere ptarmico (Anglicè *Snuff Boxes*) quinque par' fixularum metallinarum (Anglicè *Settled Buckles*) duodecim fibulis septem lapillis ornat' (Anglicè *seven Ston'd Buttons*) una serie Cyanorum & Granator' (Anglicè a *Set of Turks and Garnets*) sex par' Erearum fibularum sex par' lapidearum fibularum (Anglicè *Stone Buttons*) quatuor poculis pro potu Turcico unice marginatis (Anglicè vocat' *single Cupt Coffee Dishes*) duodecim longis & duodecim rotundis fibulis lapideis (Anglicè *Stone Buttons*) sex argenteis rutellis (Anglicè *Scoops*) octo par' fibular' (Anglicè *Buttons*) una Theca argentea (vocat' a *Spytinging-Case*) quatuor poculis moræ Japoniæ pictis duplicat' marginat' (Anglicè vocat' *Japan double*)

double Tipt Mugge) duobus poculis moræ Japomæ pictis (Anglicè *Wants (alias) Teynd Mugs*) cum pedibus unice marginat' un' par' parvorum Can- *Wants (alias)*
delaborum argenteorum septem poculis lapideis (vocat' *Fire Stone*
Mugs) duobus poculis pictis duplicat' marginat' sex parvis poculis *Wants (alias)*
(vocat' *Mugs*) duobus magnis poculis (vocat' *Mugs*) duplicat' *Wants (alias)*
marginat' uno poculo (vocat' *a Mug*) unice marginat' tribus *Wants (alias)*
pixidibus pro pecunia (Anglicè *Honey Doves*) duobus poculis
(vocat' *Diam Cups*) una pixide pro zibetho (Anglicè *a Civit. Bor*)
tresdecim cochlearibus argenteis undecim argenteis furculis
(Anglicè *Forks*) & viginti & duabus peciis auri (vocat' *Guineas*)
ad valentiam Centum octoginta & septem librarum quindecim
solidorum & quinque denarios ut de bonis & catallis suis propriis
Et sic inde possessionat' existen' idem Johannes postea scilicet
eodem tertio die Octobris anno Tertio supradicto apud Bury Sancti
Edmundi prædict' bona & catalla illa præfat' Roberto ad eadem à *To be carried*
Bury S. Edmundi usque Civitatem London' prædict' salvo ducend' *from Bury to*
custodiend' & carriand' tradidisset & deliberasset & præfat' Roberto *London.*
adtunc & ibidem præ manibus solvisset tres solidos legalis monet'
Anglia pro carriage & portatione bonorum & catallorum illorum
quæ quidem bona & catalla prædictus Robertus ad eadem à Bury
Sancti Edmundi prædict' usque prædict' Civitatem London' salvo
ducend' custodiend' & carriand' & prædictos tres solidos pro
carriage & portatione eorundem adtunc & ibidem habuisset &
recepisset prædictus tamen Robertus bona & catalla prædicta post
deliberationem inde eidem Roberto juxta consuetudinem prædict'
& officii sive oneris communis portator' prædict' exigent' non
carriavit usque Civitatem London' prædict' set idem Robertus bona
& catalla prædict' tam negligent' & improvide custodivit carriavit
& disposuit quod pro defect' bonæ curæ & custod' ipsius Roberti
bona & catalla prædicta postea scilicet quarto die Octobris anno
Tertio supradicto apud Bury Sancti Edmundi prædict' amissa &
deperdit' fuerunt ad dampnum ipsius Johannis ducentarum librarum
Et inde producit' sectam, &c.

*To be carried
from Bury to
London.*

*The Defendant
lost them.*

Et præd' Robertus per Johan' Craske Attorn' suum ven' & defend' *Not Guilty*
vim & injur' quando, &c. Et die' quod ips' in nullo est culpabilis de *pleaded.*
præmissis superius ei imposuit prout prædict' Johannes Chamberlaine
superius versus eum Queritur Et de hoc pon' se super Patriam
Et prædict' Johannes Chamberlaine similiter Ideo Pæcept' est Vic'
quod Venire fac' hic à die Sanctæ Trinitatis in tres septimanas
duodecim, &c. Per quos, &c. Et quia nec, &c. ad tæcogn', &c.
Quia tam, &c.

Chamberlain

Chamberlain *versus* Cooke.

In an Action against a Common Carrier the Plaintiff declared, that he was possessed of divers Goods. (Viz.) Quatuor poculis argenteis, uno poculo argenteo, duabus seriebus aurearum fibularum, (Anglicè, Sets of Gold Buttons) una serie Cyanorum & Granatorum, (Anglicè, a Set of Turks and Garnets) and of divers other things in the Declaration mentioned; and that he delivered them to the Defendant to carry from Bury St. Edmonds to London, there to be safely delivered to the Plaintiff, and that he paid the Defendant Three Shillings for the Carriage, and that the Defendant afterwards through Negligence lost them.

The Defendant pleaded Not Guilty, and after Verdict for the Plaintiff it was moved in Arrest of Judgment, that the Declaration was insufficient.

First, He declares of four Silver Pots, and then afterwards of one Silver Pot, and doth not say uno *alio* poculo; and the like Omission there is in divers other parts of the Declaration: Sed non allocatur. For if for want of the word *alio* or *alii* the thing shall be taken to be the same, and so a Tautology, then the Jury shall not be supposed to have given Damages for the things so laid; and if in Construction they are to be taken as divers Pots, then Damages are well given for them.

Secondly, And that which was most insisted upon was the uncertainty of a Set of Buttons, and not said how many Turkey Stones and how many Garnets; as an Action of Trover pro ducentis ovibus matricibus & agnis has been held naught, for not setting forth how many Ewes and how many Lambs.

But the Court here held the Declaration well enough; for a Set is a sufficient certainty, being intended to be well known to those that deal in such things, and in what number the Precious Stones are placed in such Sets. The Case of Tailour and Wells, Trin. 21 Car. 2. Rot. 302. B. R. Trover decem parium velorum & regularum (Anglicè, Ten pair of Curtains and Vallenge) where the Plaintiff had Judgment, is as incertain. In Sry. 419. Trover for Two pieces of Cloth. Vid. Cro. 244. a Harband set with Pearls and Diamonds, the Plaintiff had Judgment in Trover. Sed Nota, In that Case no Exception was taken to the Incertainty. Mod. Rep. 46. and Siderfin 445. Herbert and Lane. Vid. Sry. 370. an Action against an Innkeeper for a Pack of Cloaths and other Goods lost. Sic Nota, A Carrier's Pack a sufficient Certainty.

Vid. *Kelw.*
153. Devise
of a Brew-
house, with
Utenfils be-
longing to
Brewing,
and not
said what
they were.
2 Siderfin
174. Feke
and Ward.

Killigrew *versus* Sawyer.

IN an Action of Covenant the Plaintiff Declared, That he had and held the Office of Vice-Chamberlain to the Queen Dowager, and that by Deed produced in Court he agreed with the Defendant for the sale of the said Office, and that the Defendant should hold it with the Consent of the Queen. But by the said Writing the Defendant obliged himself, That the Plaintiff should have, receive and enjoy (during the Life of the Plaintiff) others Pensions and Salaries belonging to the said Office, and that the Defendant should receive no part of them.

Then he sets forth, That the Defendant, at his Procurement, and with the Approbation of the Queen, was admitted into the said Office, and enjoyed it, and there were six years Arrear of a certain Salary belonging to the said Office, according to the Agreement aforesaid, due and payable to the Plaintiff, which he the Plaintiff had not received, and the Defendant had not paid unto him licet sepius requisitus, and so the Defendant had broke his Covenant.

The Defendant pleaded in Bar, That he had from the time of the Agreement aforesaid, to the time of the Writ brought, permitted the Plaintiff to receive yearly the Profits of the said Office, according to the said Agreement; absque hoc, that the Defendant had or received any part of the Profits of the said Office.

To this the Plaintiff Demurred, and shewed for the Cause of Demurrer, that the Defendant had traversed Matter not alleged.

And upon the first Argument Judgment was given for the Plaintiff by the whole Court, that the Traverse was not good: And the Court held, that upon this Agreement the Defendant was not bound to pay the Money grown due for the Profits of the Office to the Plaintiff; but was only restrained from intermeddling with them, and to leave them to be received by the Plaintiff.

Bush *versus* Buckingham.Debt upon a
Bond.

Bedf. ff. **T**HOMAS Buckingham nuper de Shenly in Com' Bucks Deoman, alias dict' Thomam Buckingham de Houghton Reg' in Com' Bedford' Deoman, sum' fuit ad respondend' Mariæ Bush Vid' de placito qd' reddat ei centum libras quas ei debet & injuste detinet, &c. Et unde eadem Maria per Robertum Jenkin Attorn' suum dic' qd' cum prædictus Tho' undecimo die Maji Anno Dom' millesimo sexcentesimo octogesimo sexto apud Luton' per quoddam scriptum suum obligatorium concessisset se teneri præfari Mariæ in prædictis centum libris solvend' eidem Mariæ cum inde requisit' fuisset prædictus tamen Thomas licet sepius requisit' prædictam centum libras eidem Mariæ nondum reddidit. Set ill' ei hucusq; reddere contradixit & adhuc contradic' unde dic' qd' deteriorat' est & dampnum habet ad valenc' viginti librarum. Et inde producit' Sectam, &c. Et profert hic in Cul' scriptum prædictum qd' debitum prædictum in forma præd' testatur cujus dat' est die & anno supradict', &c.

Profert in
Cula scriptum.Defendant
craves Oyer
of the Con-
dition.

Et prædictus Thomas per Humfrid' Taylor Attorn' suum ven' & defend' vim & injur' quando, &c. Et per audit' scripti prædicti & ei legitur, &c. per' etiam audit' conditionis ejusdem scripti & ei legitur in hæc verba, *The Condition of this Obligation is such, that if the abovesaid Thomas Buckingham and William Holk, or either of them, they or either of their Heirs, Executors, Administrators or Assigns, or any of them do or shall well and truly pay or cause to be paid unto the abovesaid Mary Bush, her Executors, Administrators or Assigns, or any of them, the full and just sum of fifty two pounds and ten shillings of good and lawful money of England in or upon the twelfth day of November next ensuing the date hereof without fraud or further delay. That then this present Obligation to be void and of no effect, or else to remain in full force and vertue. Quibus lectis & audis' idem Thomas dic' qd' ipse de debito prædict' virtute scripti prædicti onerari non debet quia dic' qd' per quendam Actum in Parlamento Dom' Caroli Secundi nuper Reg' Angliæ inchoat' & tent' apud Westm' in Com' Midd' vicesimo quinto die Aprilis Anno Regni sui duodecimo edit' & provis' inter alia inactitat' fuit Autoritat' ejusdem Parliament' qd' nulla persona sive personæ quæcunq; ab & post vicesimum nonum diem Septembris Anno Dom' millesimo sexcentesimo & sexagesimo super aliquem contractum ab & post prædictum vicesimum nonum diem Septembris caperet seu caperent direct' vel indirect' pro accommodatione (Anglicè, leave) aliquorum denar' mercimoniorum merchandizarum vel al' commoditat' quorumcunq; ultra valor' sex librarum pro differend' (Anglicè, forbearance) centum librarum pro Anno & sic secundum istam ratam pro majori vel minori summa vel pro*

And pleads
the Statute
of Usury.

pro longiori seu breviori tempore Et qd' omnes obligationes (Anglice Bonds) contract' & assuranc' quecunq. post tempus prædict' fact' pro solutione alicujus principal' summæ pecun' accommodand' vel convent' performari super vel pro aliqua usuria (Anglice Usury) super quas vel per quas reservat' vel capt' foret ultra ratam sex librarum in centum libris ut præfertur penitus vacuæ forent prout per eundem Actum (int' al') plenius liquet & prædictus Thomas dic' qd' post prædict' vicesimum nonum diem Septembris in Actu præd' superius mentionat' & ante confectiōem scripti obligat' prædict' scilicet præd' undecimo die Maii An' Dom' millesimo sexcentesimo octogesimo sexto supradict' apud Luton præd' int' præfat' Mariam & ipsum Tho' corrupt' & contra form' Statut' predict' agreeat' & concordat' fuit qd' præd' Maria accommodaret eidem Thomæ quinquagint' libras eidem Mariæ prædict' duodecimo die Novembris in Conditione præd' spec' resolvend' qd'q; prædict' Thomas pro lucro interesse differendo & dando diem solutionis prædict' quinquaginta librarum per tempus illud solveret præfat' Mariæ summam duarum librarum & decem solidorum Qd'q; pro securitat' solutionis tam prædictarum quinquaginta librarum de principal' debito præd' quam prædict' duarum librarum & decem solidorum ipse idem Thomas per scriptum suum obligatorium debet' legis forma conficiend' deveniret tent' & obligat' præfat' Mariæ in centum libris cum conditione eidem subscript' pro solutione quinquaginta & duarum librarum & decem solidorum super prædict' duodecimum diem Novemb' tunc prox' sequen' & idem Thomas ulterius dic' qd' in performance corrupt' concordat' prædict' int' ipsam Mariam & præfat' Thomam in forma præd' habit' & fact' prædict' Mariæ postea scilicet prædict' undecimo die Maii Anno Dom' millesimo sexcentesimo octogesimo sexto supradicto apud Luton' prædict' accommodavit ei' em Thomæ quinquaginta libras resolvend' eidem Mariæ prædicto duodecimo die Novembris tunc prox' sequen' Qd'q; ipse idem Thomas pro secur' solutione tam prædictarum quinquaginta librarum quam prædict' duar' librar' & decem solid' pro interesse & lucro differendo diem solutiōis inde per scriptum obligatorium prædictum hic in cur' prolat' adtunc & ibidem devenit tent' & obligat' præfat' Mariæ in prædict' centum libris cum conditione prædict' superius recitat' Qd'q; prædict' Maria tunc & ibidem accepit prædict' scriptum obligatorium pro solutione prædict' quinquaginta duarum librarum & decem solidorum secundum formam & effectum corrupt' concordat' prædict' Et prædict' Thomas ulterius die qd' prædicta summa duarum librarum & decem solidorum pro differend' & dand' diem solutionis prædict' quinquaginta librarum pro tempore prædict' sic ut præfertur excedit rat' sex librarum pro centum libris pro uno anno per quod scriptum obligatorium prædictum hic in Cur' prolat' vigore prædict' Actus Parliamenti vacuum & nullius vigoris in lege existit & hoc parat' est verificare unde per' Judicium si ipse de debito prædict' virtute scripti obligatorii præd' onerari debeat, &c.

The Usurious Contract.

The Bond to be given thereupon.

The Money lent.

And the Bond in question given for it.

Exceeds six per Cent.

M

Ez

The Plaintiff
replies, that the
Bond was made
by a Scrivener
in his absence,
who mistook
the Condition,
and Traverses
the Corrupt
Agreement.

A Scrivener
made the Bond.

Paid the Money
to the Defen-
dant.

And took the
Bond without
the Plaintiffs
notice.

Traverse of the
Corrupt Agree-
ment.

Demonstr.

Joynder.

Et prædict' Maria dic' qd' ipsa per aliqua præallegat' ab actione sua prædict' versus prædict' Thomam habend' præcludi non debet. Quia dic' qd' prædicto undecimo die Maii Anno Dom' millesimo sexcentesimo octogesimo sexto supradicto apud Luton' prædict' ad requisitionem prædict' Thomæ int' ipsos Mariam & Thomam agreeat' fuit in forma sequen' videlicet qd' eadem Maria accommodaret dict' Thomæ quinquaginta libras legalis Monet' Angliæ ac de eo haberet & reciperet pro interesse & dando diem solutionis inde secundum ratam quinq; librarum pro centum libris pro uno anno & non amplius. Qd'q; quidem Thomas Cheyne de Luton præd' scriptor qui tunc in manibus suis habuit quinquagint' libras de denar' ipsius Mariæ illas dict' Thomæ Buckingham solveret & deliberaret ac prepararet & de præfat' Thoma Buckingham & præd' Willielmo How in conditione nominat' caperet ad usum ipsius Mariæ legale scriptum Obligatorium cum Conditione pro solutione prædictarum quinquaginta librarum cum interesse secundum ratam quinq; librarum pro centum libris ut præfertur. Et eadem Maria ulterius dic' qd' prædict' Thomas Cheyne postea die & anno uk' specificat' apud Luton' præd' solvit & deliberavit prædict' Thomæ Buckingham prædict' quinquaginta libras ac ad tunc & ibidem in absencia & sine noticia ipsius Mariæ prædict' scriptum Obligatorium in placito prædicto superius spec' scripsit & de prædict' Thoma Buckingham & Willielmo cepit in conditione ejus prædict' summa quinquaginta & duarum librarum & decem solidorum pro quinquagint' & un' libris & quinq; solidis negligent' improvide & ex errore prædicti scriptoris contra voluntatem & absq; noticia ipsius Mariæ script' & insert' fuit absq; hoc qd' int' ipsam Mariam & præfat' Thomam Buckingham corrupte contra formam Statut' prædict' agreeat' seu concordat' fuit modo & forma prout præd' Tho. Buckingham superius placitando allegavit. Et hoc parat' est verificare unde per' judic' & debitum suum prædictum unacum dampnis suis occasione detentionis debiti illius sibi adjudicari, &c.

Et prædict' Tho. Buckingham dic' qd' placitum prædict' per præfat' Mariam superius replicando placitat' materiaq; in eodem content' minus sufficien' in lege existunt ad ipsam Mariam action' suam prædict' inde verius eum habend' manutend' ad quod quidem placitum modo & forma prædict' superius placitat' idem Thomas Buckingham necesse non habet nec per legem Terræ tenetur aliquo modo respondere. Et hoc parat' est verificare prout Cur', &c. Unde pro defectu sufficien' replicationis in hac parte idem Thomas Buckingham (ut prius) per' judic' & qd' prædict' Maria ab actione sua præd' inde versus eum habend' præcludatur, &c.

Et prædict' Maria ex quo ipsa sufficien' materiam in lege in placito suo prædict' superius replicando placitat' ad ipsam Mariam actionem suam præd' versus prædict' Thomam Buckingham habend' manutend' superius allegavit quam ipsa parat' est verificare quam quidem materiam prædict' Thomas Buckingham non dedic' nec ad cam

eam aliquant' respond' set verificationem ill' admittere omnino recusat eadem Maria ut prius pet' judicium & debitum suum præd' unacum dampnis suis occasione detentionis debiti illius sibi adjudicari, &c.

Bush versus Buckingham.

DEbt upon Bond in 100 l. penalty.

The Defendant demands Oyer of the Condition, which was to pay the Plaintiff 52 l. 10 s. upon the 2d day of November, which was at the end of six months after the end of the date of the Bond, and pleaded the Statute of 12 Car. 2. that none should take above 6 l. per Cent, for use of Money, and makes all Bonds and Contracts for more use void, and shews that it was corruptly agreed between the Plaintiff and Defendant, that the Plaintiff should lend to the Defendant upon the 11th of May 1686. fifty pounds, and that he was to pay the Plaintiff 2 l. 10 s. for the forbearance thereof upon the 12th of November next ensuing, and for securing of the payment thereof, the Defendant should become bound in the Obligation, upon which the Action was brought, and in performance of the said corrupt Agreement the Plaintiff lent the Defendant the 50 l. and he became bound ut supra to the Plaintiff, and that the Plaintiff did receive the aforesaid Bond, which became void by force of the said Statute, and so demands Judgment of the Action.

The Plaintiff replies, That upon the 11th of May aforesaid, it was agreed, that he should lend 50 l. to the Defendant, and that the Defendant should pay for the forbearance thereof according to the rate of 5 l. per Cent. and no more, and that J. S. a Scrivener had 50 l. of the Plaintiffs in his hands, and it was agreed between the Plaintiff and Defendant, that the said J. S. should pay the 50 l. to the Defendant, and that the said Scrivener should take a lawful Bond with Condition to pay the interest according to the rate of 5 l. per Cent. and that the said J. S. the Scrivener did pay to the Defendant the said 50 l. and in the absence, and without the notice of the Plaintiff, took the Bond ut supra, ex errore præd' Scriptoris, contra voluntatem & absq; notitia ipsius Quer' 2 l. 10 s. was inserted in the Condition ut supra, for six months forbearance absq; hoc, that it was corruptly agreed between the Plaintiff and Defendant, as the Defendant by his Plea allegeth.

To this Replication the Defendant demurred, and it was insisted upon, that here tis expressly pleaded, that the Plaintiff accepted the said Bond, which implies a consent to it; and tho' the Plaintiff says in the Replication, that he had no notice at the time of the taking of the Bond, yet if there were notice when it was accepted, that carries the Plaintiffs consent to the corrupt

Agreement. But the whole Court gave Judgment for the Plaintiff, and held it to be the same Case with that of Nevison and Whitley, 3 Cro. 501. For tho' the Plaintiff did know how it was when the Bond was accepted, as it must be supposed in the Case of Nevison, That the Plaintiff had Notice how it was when the Action was brought, yet that does not make the Plaintiff party to the corrupt Agreement; and the Plaintiff must use the Bond of necessity to recover the Money, 2 Cro. 677. Buckley and Guilbank's Case.

Bracton versus Lister.

An Action against an Administrator, and not shewn in the Declaration that Letters of Administration were committed to him.

And this was held by the Court incurable. For tho' they were not shewn by what Authority they were committed, yet it is necessary to set forth that Administration was committed to charge him with the Action.

Otherwise of an Executor; It is not necessary to shew he proved the Will, because an Action lies against him before Probat.

Dawson versus the Sheriffs of London.

Case against
a Sheriff for
Returning of
a Nulla tena
upon a Special
Utlawry, and
when the party
had Goods.

J.S. indebted to
the Plaintiff.

For Goods sold.

And also upon
an Account
stated.

Midd' ff. **J**OHANNES Parsons nuper de London' Mil' & Basil' Firebras nuper de London' Mil' nuper Vic' Civitat' London' Attach' fuer' ad respondend' Johanni Dawson de placito Transgr' super Casum, &c. Et unde idem Johannes Dawson per Carolum Blood Attoro' suum queritur quod cum quidam Radulphus Davis nuper de London' Vinther tertio decimo die Junii anno regni Domini Jacobi secundi nuper Regis Angl', &c. Tertio apud London' in Paroch' Beate Marie de Arcubus in Warda de Cheape indebitat' fuisset eidem Johanni Dawson in viginti & quinque libris legalis monet' Angl' pro servitia, lupulat' & illupulat' (Anglice Beer and Ale) per predict' Radulph' de eod' Johanne Dawson ante tempus illud habit' & recept' ac sic inde indebitat' existens predict' Radulph' in cons. inde super se assumpsit & eidem Johanni Dawson ad tunc & ibidem fidelit' promisit quod ipse predict' Radulph' predict' viginti & quinque libras prefat' Johanni Dawson cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam postea scilicet tertio decimo die Junii anno tertio supradicto apud London' predict' in paroch' & Warda predict' computasset cum prefat' Johanne Dawson de diversis denar' summis eidem Johanni Dawson per prefat' Radulph' tunc debet' pro diversis al' servitia, lupulat' & illupulat' (Anglice Beer and Ale) per ipsum Radulph'

Radulph' de eodem Johannes Dawson ante tempus illud empr' & habit' & super compos' illo prædict' Radulph' invent' fuit in arrearag' erga eundem Johannem Dawson in al' vigint' & quinque libris confimilis legalis moniet' *Angl'* & sic inde in arrearag' existen' ipse idem Radulphus in cons. inde super se assumpsit præfatoque Johan' Dawson ad tunc & ibidem fidelit' promissit quod ipse idem Radulph' prædict' vigint' & quinque libras eidem Johanni Dawson cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet prædict' tamen Rad' sepe rat' promission' & assumption' suas prædict' in forma prædict' fact' minime curans sed machinans & fraudulent' intendens eundem Johannem Dawson de prædict' sepe rat' libris denar' summis (in toto se attingen' ad quinquagint' libr') in hac parte casside & subdole decipere & defraudare prædict' quinquagint' libr' seu aliquam inde denar' eidem Johanni Dawson juxta promission' & assumption' suas prædict' nondum solvit seu aliquatit' pro eisdem contentavit licet ad hoc faciend' prædict' Radulphus postea scilicet quarto decimo die Junij anno tertio supradicto apud London' præd. in parochia & Warda prædictis per prædict' Johannem Dawson requisit' fuisset set ill' ei solvere omnino recusavit ad dampn' ipsius Johan' Dawson quadragint' librarum Cumque idem Johannes Dawson pro obtentione dampnorum suorum per ipm occasione non performance promission' & assumption' prædict' sustentat' in Cur' dicti nuper Regis Jacobi Secundi de Banco hic scilicet apud Westm' per breve Original' ipsius nuper Regis extra Cur' Cancellar' ejusdem nuper Regis apud Westm' prædict' emanat' & retornabile & retornat' coram Justic' ejusdem nuper Regis de Banco hic Implacitasset præd' Radulph' in placito Transgr' super Casum pro non performance promission' & assumption' prædict' Idemque Radulph' pro eo quod non venit in eadem Cur' dicti nuper Regis hic præfat' Johanni Dawson inde respons' secundum legem & cons' hujus Regni posit' fuisset in exigendo utlagand' in London' prædict' & ea occasione postmodum scilicet die Lun' Viceesimo tertio die Aprilis anno regni dicti nuper Regis Jacobi Secundi, &c. Quarto Utlagar' fuit in London' ad sectam præfat' Johan' Dawson de præd' placito prout per Record' inde in Cur' hic remanen' plenius liquet & apparet Cumque etiam idem Johannes Dawson pro citiori expedition' sectæ suæ prædict' habend' postea scilicet quarto die Julii Termino Sanctæ Trinitat' anno regni dicti nuper Regis Quarto prosecut' fuit extra eandem Cur' dicti nuper Regis de Banco hic scilicet apud Westm' prædict' quoddam breve dicti nuper Regis de Capias utlagat' super utlagat' prædict' tunc Vic' Civitat' London' prædict' direct' per quod quidem breve idem nuper Rex eisdem tunc Vic' Præcepit quod non omitterent propt' aliquam libertatem Civitat' London' prædict' quin per Sac' proborum & legalium hominum de balliva sua diligent' inquir' quæ bona & catalla tetr' & tenementa præd' Radulphus habuit in balliva sua prædict' Viceesimo tertio die Aprilis anno regni dicti nuper Regis

7. 3. did not
pay the Money.

The Plaintiff
sues out an
Original.

Upon an
Assumpsit.

And is there-
upon Out-
lawed.

The Plaintiff
sues out a
Special Writ
of Outlawry
thereupon.

Quarto

Quarto supradicto vel unquam postea quo die ut praefertur idem Radulphus utlagat' fuit & ill' per eorum Sac' extend' & appretiar' fac' juxta verum valorem eorundem Ac ea quæ per inquisic' ill' inven' in manus ejusdem nuper Regis caper' & salvo custod' facerent Ita quod de vero valore & exit' eorundem eidem nuper Regi respond' Et ill' sic extent' & appretiat' quod inde fac' Scire fac' Justic' ipsius nuper Regis hic scilicet apud Westm' prædict' à die Sancti Michaelis in tres Septimanas tunc prox' sequen' distincte & aperte sub sigillis suis & sigillis eorum per quorum Sac' extent' & appretiationem ill' fac' Ac pro eò quod idem Radulphus utlagat' latitat & discur' in Civitat' London' prædict' in contempt' ipsius nuper Regis & Coronæ suæ præjudicium Idem nuper Rex eisdem tunc Vic' præcepit quod prædict' Radulph' ubicunque in balliva sua tam infra libertat' quam extra invenire continger' caper' & cum salvo custod' Ita quod haberent corpus ejus coram Justic' dicti nuper Regis de Banco prædict' hic apud Westm' prædict' ad præfat' termin' ad fac' & rec' quod eadem Cur' de eo cons' in ea parte & quod haberent tunc hic breve illud quod quidem breve idem Johān' Dawson postea & ante prædict' tres Septimanas Sancti Michaelis scilicet sexto die Julii anno quarto supradicto deliberavit præfat' Johanni Parsons & Basil Firebras tunc Vic' Civitat' London' prædict' existen' in forma Juris exequend' Ac licet prædict' Radulphus die Utlagaræ præd' ac tempore deliberationis præd' brevis eisdem Vic' (ut præfertur exequend') & postea diversa habuit bona & catalla ad valenc' quadragint' librar' & amplius in balliva ejusdem Vic' scilicet apud London' præd' in paroch' Beatæ Mariæ de Arcubus in Warda de Cheape quæ iidem Vicecom' extend' appretiar' & in manus dicti nuper Regis Jacobi Secundi caper' & seiscire potuer' prædict' tamen Johannes Parsons & Basil Firebras Vic' Civitat' præd' ut præfertur existen' Officia sua prædict' in vera & justa executione prædict' brevis dicti nuper Regis minime curan' sed machinan' & fraudulenter intenden' non solum ipsum nuper Regem de eo quod ad ipsum pertinet occasione Utlagar' præd' defraudare ac ipsum nuper Regem & Cur' suam hic illudere Verum etiam ipsum Johannem Dawson ab assécutione & recuperatione dampnorum suorum præd' retardare aliqua bona seu catalla terras seu tenementa præd' Radulph' in balliva sua extend' appretiar' vel in manus dicti nuper Regis capiend' minime fecerunt set hoc facere recusaver' & penitus neglexer' & ad prædict' tres Septimanas Sancti Michaelis Anno regni dicti nuper Regis Jacobi Secundi Quarto supradicto Justic' dicti nuper Regis de Banco hic scilicet apud Westm' præd' falso deceptivo & fraudulenter retorn' quod idem Radulphus nulla habuit bona seu catalla terras seu tenementa nec die utlagariæ præd' seu unquam postea aliqua habuisset in balliva sua quæ extendi appretiar' seu in manus dicti nuper Regis capere potuer' prout eis per breve prædict' Præcept' fuit in dicti nuper Regis contempt' Ac in

The Writ
delivered to
the Defendants.

J.S. was posselt
of divers Goods.

The Defen-
dants refuse
to seize the
Goods, but
Return a
Nulla bona.

in Cur' hic illusionem ac prædict' sectæ ipsius Johannis Dawson dilationem & retardationem manifest' ad dampnum ipsius Johannis Dawson quinquagint' librar' Et inde producit sectam &c.

Et prædict' Johannes Parsons & Basil Firebrace per Johannem Halleswood Attorn' suum ven' & defend' vim & injur' quando, &c. Et iidem nuper Vic' dicunt quod prædict' Johannes Dawson' action' suam prædict' versus eos habere non debet quia dicunt quod antequam per Sac' proborum & legalium homin' de balliva sua inquireret quæ bona & catalla terr' & tenementa prædict' Radulph' habuit in balliva sua ut ill' per eorum Sac' extend' & appretiat' faceret juxta verum valorem eorundem prout prædict' breve de Capias de Utlagar' super Utlagar' prædict' in se exigebat & requirebat scilicet Vicefimo tertio die Julii anno regni Jacobi Secundi nuper Regis Angl' &c. Quarto deliberat' fuit eisdem nuper Vic' Quoddam breve Prærogativæ de Cur' Scaccarii dicti nuper Regis apud Westm' scilicet quarto die Julii anno regni dicti nuper Regis Quarto emanat' eisdem nuper Vic' direct' in forma juris exequend' per quod quidem breve Præcept' fuit eisdem nuper Vic' quod de bonis & catallis terris & tenementis præfat' Radulphi Davis in balliva ejusdem nuper Vic' quoddam debitum quadragint' librar' fieri & levare facerent quod cap' & scisit' fuit in manus dicti nuper Regis per Thomam Rawlinson Mil' & Thomam Fowle Mil' nuper Vic' Midd' vicefimo secundo die Januarii anno regni dicti nuper Regis secundo Quoque per Judicium Baron' dicti Scaccarii dicti nuper Regis apud Westm' postea reddit' recuperat' fuit per dict' nuper Regem versus præfat' Radulph' Davis Ita quod denar' ill' cum sic levassent iidem nuper Vic' scilicet Johannes Parsons & Basil Firebrace haberent coram tunc Baron' de Scaccario apud Westm' prædict' à die Sancti Michaelis in tres Septiman' anno regni dicti nuper Regis Quarto dict' Cur' ejusdem nuper Regis tunc ibidem ad usum ipsius nuper Regis solvend' Virtute cujus quidem brevis Prærogativi prædict' iidem Vic' scilicet Johannes Parsons & Basil Firebrace seiscire fecerunt omnia bona & catalla prædict' Radulphi Davis in balliva ejusdem nuper Vic' prout breve Prærogativ' in se exigebat & requirebat Quæ quidem bona & catalla per appretiator' per eisdem nuper Vic' scilicet Johannem Parsons & Basil Firebrace nominat' appret' sue ad viginti & septem libras quinque solidos & novem denar' quos quidem viginti & septem libras quinque solidos & novem denar' iidem nuper Vic' scilicet Johannes Parsons & Basil Firebrace habuer' coram Baron' de Scaccario dicti nuper Regis apud Westm' prædict' ad diem & locum in brevi Prærogativo prædict' content' dict' Cur' ejusdem nuper Regis tunc ibidem ad usum ipsius nuper Regis solvend' prout per breve Prærogativ' prædict' eis præcept' fuit Et prædict' nuper Vic' scilicet Johannes Parsons & Basil Firebrace ulterius dicunt quod prædict' Radulphus null' aliqua alia sive plura bona & catalla terr' aut tenementa die Utlagar' prædict'

The Defendants plead, That a Prærogative Writ came out of the Exchequer, whereupon they were seized.

The Prærogative Writ sued out.

The Sheriffs thereupon seized the Goods.

And Appraised them.

Nulla alia bona.

seu unquam postea habuisset in balliva sua quæ extendi appretiar' seu in manus dicti nuper Regis cap' potuer' præterquam bona & catalla prædict' ut præfertur scisit' virtute brevis Prærogativi prædict' Et hoc parat' sunt verificare Et pet' Judicium si prædict' Johannes Dawson action' suam prædictam inde versus eos habere debeat, &c.

Demurrer.

Et prædict' Johannes Dawson dicit quod prædict' placitum prædict' Johannis Parsons Mil' & Basil' Firebrace Mil' superius in barram placitat' ac materia in eodem content' minus sufficien' in lege existunt ad ipsum Johannem Dawson ab actione sua prædict' versus prædict' Johannem Parsons Mil' & Basil' Firebrace Mil' habend' præcludend' quodque ipse ad placitum illud modo & forma prædict' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defect' sufficien' Respons' prædicti Johannis Parsons & Basil' Firebrace Mil' in hac parte placitat' Idem Johannes Dawson pet' Judicium & dampna sua occasione Transgr' illius sibi adjudicari, &c.

Joynder.

Et prædict' Johannes Parsons & Basil' Firebrace ex quo ipsi sufficien' materiam in placito suo prædicto ad prædict' Johannem Dawson ab actione sua prædict' versus eos habend' præcludend' superius allegaver' quam ipsi parat' sunt verificare quam quidem materiam prædict' Johannes Dawson non dedit nec ad eam aliquammodo respond' sed verificationem illam admittere omnino secusat iidem Johannes Parsons & Basil' Firebrace pet' Judic' & quod prædict' Johannes Dawson ab actione sua prædict' versus eos habend' præcludatur &c.

Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judicium inde reddant dies dat' est partibus prædict' hucusque à die Sancti Michaelis in tres Septimanas de audiend' inde Judicio suo eo quod iidem Justic' hic inde nondum, &c.

Dawson

Dawson versus The Sheriffs of London.

IN an Action upon the Case against Sir John Parsons and Sir Basil Firebrace, Sheriffs of London.

The Plaintiff Declared, That whereas one Ralph Davis was Indebted to him in 25 l. and to recover it he brought an Original Writ, Returnable in the Common Pleas; and for that the said Davis did not appear, he prosecuted him to an Outlawry in London. And the said Davis was Outlawed, and thereupon the Plaintiff took out a Capias Utlagatum in Trinity Term, 4 Jacobi nuper Regis, directed to the Defendants, then Sheriffs of London; by which Writ they were commanded to enquire what Goods and Chattels, Lands and Tenements the said Davis had at the time of the Outlawry, or at any time since, and to Extend and Appryze the same, and to Return such Extent in tres Septimanas sci Michael, and that they should take the said Davis, &c. Which Writ was delivered to the Defendants, then Sheriffs of London: And altho' the said Davis had at the time of the Outlawry, and after, divers Goods and Chattels to the value of 40 l. and more, within the Bailiwick of the said Sheriffs, which they might have taken appryzed and extended; yet not regarding the Duty of their Office, non solum ipsum Regem de eo quod ad ipsum pertinet occasione Utlagariæ prædictæ defraudare verum etiam ipsum Johannem Dawson ab asscutione & recuperatione debiti prædicti retardare, they did not take, seize or extend the said Goods, but neglected and refused to do it; and at the Day of the Return of the Writ, falsly, deceitfully and fraudulently Returned, that the said Davis had no Goods and Chattels, Lands or Tenements at the time of the Outlawry, or ever after within their Bailiwick, in Dom Regis contemptum Curiae hic illusionem & in Sectæ ipsius Quer' dilationem & retardationem ad damnum Quadraginta Librarum.

To this the Defendant pleaded, That befoze they made any Enquiry of the Goods, &c. of the said Davis, (viz.) the 23d of July, Anno regni nuper Regis Jacobi Secundi quarto, a Prerogative Writ was issued out of the Exchequer to them the said Sheriffs directed, whereby they were commanded to levy a certain Debt of 40 l. of the Goods and Chattels, Lands and Tenements of the said Davis, which was taken and seised into the hands of the said late King by Rawlinson and Fowle, late Sheriffs of Middlesex, and which was recovered by the said late King in the Court of Exchequer, against the said Davis, &c. by virtue of which Writ they seized all the Goods of the said Davis in their Bailiwick, which were appryzed at 27 l. which they Returned into the Exchequer, as the Writ required; and the said Davis had no other

¶

Goods

Goods or Chattels, Lands or Tenements within their Bailiwick at the time of the Outlawry, or ever after, &c.

To this the Plaintiff Demurred, and the Court held the Plea insufficient; for they set forth, that the Predecessor Sheriffs had seized and taken the Debt into the Kings hands, so that Execution seemeth to be had before the Defendants were Sheriffs.

But Judgment was given against the Plaintiff; for the Court held that the Action would not lye for the party who has an Outlawry, that because the Sheriff upon the Cap' utlagatum neglects to extend or seize the Goods and Lands of the Outlawed person, for that is the Kings loss: And tho' it was pretended, that the Sheriff extending and seizing would be a means to enforce the Defendant to appear to the Plaintiffs Action, the Court said that it was so remote, as not to be considered as a ground to support an Action; but if it had been shewn, that the Sheriffs might have taken his Body, and had neglected to do it, there might have been more reason to support this Action. So Judgment was given, quod Querens nil capiat per breve.

Sir Thomas Gower's Case.

HE had upon a Commission made an Attorney, in order to suffer a Recovery this Term, which was done the last Assizes at York.

And the Court was now moved in behalf of the Heir in Tail to stop the passing of the Common Recovery; and several Affidavits were produced to satisfy the Court, that Sir Thomas Gower (since the said Assizes) died in Ireland, and the Court being satisfied of the truth thereof, did stay the passing of the Recovery; and they said, if it should pass, it would be Erroneous.

Bealy versus Sampson.

Trespass for
Impounding
of his Cattel,
quousque finem
fecit oi 10 l.

Lincoln' ss. **J**OHANNES Sampson' nuper de Mawvis Enderby in Com' prædict' Peoman attach' fuit ad respondend' Willielmo Bealy de placito quare ipse simulcum Georgio Francis nuper de Stamton' in Com' prædict' Labourer, Vi & armis averia ipsius Willielmi pretii quadraginta librarum apud Halton cum Beckeringe nuper invent' cepit & imparcavit & ea ibidem sic imparcat' quousque idem Willielmus finem undecim librarum pro deliberatione eorundem inde habend' cum prædict' Johanne & Georgio fecisset detinuit & alia Enormia ei intulit ad grave dampnum ipsius Willielmi Et contra pacem domini Regis nunc, &c. Et

Et unde idem Willielmus per Johannem Fancourt Attorn' suum queritur quod prædict' Johannes simulcum, &c. primo die Februar' anno regni domini Regis nunc, &c. tertio vi armis, &c. averia (viz.) quatuor boves & quatuor vaccas ipsius Willielmi pretii, &c. apud Halton cum Beckeringe prædict' nuper invent' cepit & imparcavit & ea ibidem sic imparcat' quousque idem Willielmus finem undecim librar' pro deliberatione eorundem inde habend' cum prædict' Johanne & Georgio fecisset detinuit Et alia Enormia, &c. ad grave dampnum, &c. Et contra pacem, &c. Unde dic' quod deteriorat' est & dampnum habet ad valenc' quadraginta librar' & inde produc' sectam, &c.

Et prædict' Johannes Sampson per Stephan' Malton Attorn' suum ven' & defend' vim & injur' quando, &c. Et quoad Venire vi & armis seu quicquid quod est contra pacem dicti dñi Regis nunc dic' quod ipse non est inde culpabilis prout prædict' Willielmus superius versus eum queritur Et de hoc pon' se super patriam Et prædict' Williel' similiter Et quoad resid' Transgr' prædict' superius fieri supposit' idem Johannes dic' quod prædict' Willielmus actionem suam prædict' inde versus eum habere non debet quia dic' quod ante prædict' tempus quo Transgr' prædict' superius fieri supponitur scilicet quintodecimo die Junii anno regni dicti domini Regis nunc tertio emanavit extra Cur' dicti domini Regis de Banco hic scilicet apud Westm' quoddam breve dicti domini Regis nunc de Fieri fac' versus prædict' Willielm' ad sectam ipsius Johannis tunc Vic' Com' Lincoln' direct' per quod quidem breve dictus dom' Rex nunc præfat' tunc Vic' Com' Lincoln' præcepit quod de terris & catallis prædict' Willielmi in balliva ejusdem Vic' Fieri fac' tam quoddam debitum decem librar' quod prædict' Johannes Sampson in Cur' dicti domini Regis coram Justic' ejusdem domini Regis apud Westm' recuperasset versus eum quam quadragint' solid' qui eidem Johanni Sampson in eadem Cur' dicti domini Regis adjudicat' fuer' pro dampnis suis quæ habuisset occasione detent' debiti illius & qd' denar' ill' haberet coram Justic' dicti domini Regis apud Westm' à die Sancti Martini in quindecim dies ad reddend' præfat' Johanni de debito & dampnis prædict' unde convict' fuit quod quidem breve postea & ante retorn' ejusdem brevis necnon ante prædict' tempus quo, &c. scilicet secundo die Augusti anno tertio supradicto apud Halton in Com' prædict' cuidam Antonio Eyre Ar' tunc Vic' Com' Lincoln' existen' deliberat' fuit in forma juris exequend' Virtute cujus quidem brevis prædict' Vic' prædict' Com' Lincoln' postea & ante retorn' ejusdem brevis necnon ante prædict' tempus quo, &c. scilicet eodem secundo die Augusti Anno tertio supradicto apud Halton prædict' pro executione brevis prædict' habend' fecit quoddam Warrant' suum in scriptis sigillo Officii sui Vic' sigillat' ballivo Wapentag' de Wraggoc necnon prædict' Georgio Francis Balliv' ejusdem Vic' ea vice tantum direct' per quod quidem Warrant' prædict' Vic' prædict' Com' Lincoln'

The Defendant
pleads a seizure
by the Sheriff,
by virtue of a
Fieri facias.
Non culp' to
part.

Fieri facias
issued out of
the Court of
Common Pleas

Delivered to
the Sheriff.

The Sheriff
made his
Warrant.

The Warrant
delivered to
the Defendant.

Who, with his
Servant seized
the Plaintiffs
Cattel in Exe-
cution.
And caused
them to be
Appraised.
And kept them
in Custody
until the Plain-
tiff paid the
Execution
money.
Traverse, that
he is guilty
before or after.

Special
Demurrer.

Cause of
Demurrer, that
the Traverse
is naught.

Lincoln' eis & cuilibet eorum conjunctim & divisim mandavit quod de terris & catallis prædicti Willielmi Bealy in balliva ejusdem Vic' Fieri fac' tam præd' debitum decem librar' quod præd' Johannes Sampson in Cur' dicti domini Regis coram Justic' dicti domini Regis apud Westm' recuperassent versus eum quam præd' quadragint' solid' qui eidem Johanni in eadem Cur' dicti domini Regis adjudicat' fuer' pro dampnis suis quæ habuisset occasione detentionis debiti illius ita quod denar' ill' haberet coram Justic' dicti domini Regis apud Westm' à die Sancti Martini in quindecim dies ad red- dend' præfat' Johanni de debito & dampnis prædictis unde convict' fuit quod quidem Warrant' postea & ante retorn' ejusdem brevis necnon ante prædict' tempus quo, &c. scilicet eodem secundo die Augusti Anno tertio supradicto apud Halton in Com' præd' præfat' Georgio Francis deliberat' fuit in forma juris exequend' virtute cujus quidem Warranti præd' Georgius Francis & præd' Johannes ut ejus servien' & per ejus mandat' postea & ante retorn' brevis præd' necnon ante præd' tempus quo, &c. scilicet die & anno ult' mentionat' apud Halton præd' averia prædicta in Narratione prædicta spec' in executione pro debito & dampnis præd' ceper' & seisiver' & eadem averia debito modo appreciari fec' quæ quidem averia appreciat' fuer' ad summam undecim librar' existen' verum valorem eorundem Et sic capt' & seisit' imparcaver' & detinuer' quousque præd' Williel' præd' summam undecim librar' præfat' Georgio Francis ad usum dicti Vic' pro deliberatione averiorum illorum habend' solvisset prout eis bene licuit quæ sunt idem resid' Transgr' præd' unde præd' Williel' superius se modo queritur absque hoc qd' ipse idem Johannes sit culpabil' de caption' sive detentione averior' præd' ad aliquod tempus ante præd' secund' diem Augusti Anno tertio supradicto vel post præd' quinden' Sancti Martini Anno tertio supradicto Et hoc parat' est verificare unde pet' Judicium si præd' Williel' actionem suam prædict' inde versus eum habere debeat, &c.

Et prædictus Willielmus dic' quod præd' placitum præd' Johan- Sampson superius in barram placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipsum Willielm' actionem suam prædict' versus præfat' Johannem Sampson habend' præcludend' quodque ipse ad placitum ill' modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare unde pro defectu sufficien' placiti in hac parte idem Willielm' pet' Judicium & dampna sua occasione Transgr' prædict' sibi adjudicari, &c. Et pro causis moracon' in lege idem Willielm' secundum formam Statuti ostend' & Cur' hic demonstrat has causas subsequen' videlicet quod placitum præd' male traversat' mater' & tempus in ea parte traversat' ac travers' ill' extra idem placitum omitti debuisset si non idem placitum traversasset tempus inter præd' secundum diem Augusti & præd' quinden' Sancti Martini in eodem placito

placito mentionat' Item qd' placitum prædict' suppon' averia prædict' imparcari quousq; summa undecim librarum ad usum dicti Vic' solut' fuit ubi revera dict' Vic' hujusmodi summam ad usum ipsius Vic' per legem terræ recipere non potuit.

Et prædict' Johannes ex quo ipse sufficien' mater' in lege ad præd' ^{Joynder.} Will' ab actione sua præd' habend' præcludend' superius allegavit quam ipse parat' est verificare quam quidem materiam præd' Will' non dedic' nec ad eam aliqualit' respond' sed verificationem ill' admittere omnino recusat ut prius per judicium Et qd' præd' Will' ab actione sua prædict' habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judic' inde reddant dies dat' est partibus prædict' hucusq; a die Sancti Michaelis in tres septimanas de audiendo inde Judicio suo eo qd' iidem Justic' hic inde nondum, &c.

Bealy *versus* Sampson.

The Plaintiff brought an Action of Trespals, and declared that the Defendant Sampson, simul cum Georgio Francis 1 Febr. Anno Jacobi Regis tertio, vi & armis, &c. quatuor Boves & quatuor Vacas of the Plaintiff took at Scampton in Com', &c. & imparcavit & detinuit quousq; the Plaintiff finem undecim librarum pro deliberatione earum inde habend' cum prædicto Sampson, the Defendant, & Georgio Francis fecisset, &c. ad dampnum, &c.

The Defendant pleaded not guilty as to the vi & armis, and as to the residue of the Trespals he pleaded in Bar, that before the time in which the Trespals is supposed to be done, viz. the 14th day of June anno supradicto, there went out a Writ of Fieri Facias out of this Court against the now Plaintiff at the suit of the said Defendant Sampson, directed to the then Sheriff of Lincoln to levy a Debt of 10 l. which the said Sampson had recovered in the said Court, and 40 s. for costs of Suit, and that he should have the Honey in Court in quinden' Martini ad reddend' præfato Johanni Sampson de deb' & damnis præd' unde convictus fuit: Which Writ of Fieri facias was delivered to the Sheriff of the said County, and thereupon the Sheriff, for the executing of the said Writ, made his Warrant in writing, sealed with the Seal of his Office, to one J. S. and the said George Francis Ballivus ejusdem Vicecomitis ea Vice tantum directed, commanding them to levy the said Debt and Costs, of the Goods and Chattels of the now Plaintiff, that the said Sheriff might have the Honey in Court at the day of the Return of the Writ, to pay the said John Sampson; which Warrant was delivered to the said George Francis; and by vertue of the said Warrant, the said George Francis, and the said Defendant Sampson ut ejus serviens & per ejus mandatum, the aforesaid Beasts in execution for the Debt and Costs aforesaid.

asforesaid, took and seised, and caused them to be appraised, and they were appraised at 11 l. being the true value of them, and detained them quousq; præd' W. Bealy the asforesaid sum of 11 l. to the said George Francis to the use of the said Sheriff, pro deliberation' averiorum illorum habend' solvisset prout eis bene licuit quæ sunt idem resid' transgress' præd' unde præd' Willielmus Bealy se modo queritur absq; hoc quod ipse idem Johannes Sampson est culpab' de captione, &c. ad aliquod tempus ante præd' secundum diem Augusti vel post præd' Quindend' Sancti Martini & hoc parat' est verificare.

And to this the Plaintiff demurred.

This Case was spoken to the last Term, and then Pollexfen Chief Justice and Rokeby were of Opinion for the Plaintiff, and Powell and Ventris for the Defendant; and it was again argued at the Bar this Term, and by the Opinion of the Chief Justice Powell and Rokeby, Judgment was given for the Plaintiff.

The Chief Justice and Rokeby held the Plea to be naught, chiefly because the Defendant pleads that he detained the Chattel till the Plaintiff had paid so much Money to the use of the Sheriff; whereas it should have been to the use of the Plaintiff, at whose suit the Execution was.

The Chief Justice said, that he found no Authority in Law that warranted the delivering of the Goods back to the Plaintiff, especially upon payment of part of the Money, vide 1 Cro. 404. *Stringer versus Stanlack*, but here the taking of the Money to the use of the Sheriff made him a Trespasser, for it could not be done in pursuance of the Execution. He also said, that one Farr in the time of King Charles the Second, by colour of a Writ of Execution came into the House and carried away the Goods, and it was adjudged felony. He also said, that if this manner of Pleading should be allowed, admitting that the Bayliff had agreed to take the Money to the Sheriffs proper use, how should the Plaintiff be let in to a Replication in this manner of Pleading to put the matter in issue?

Rokeby said, Parols sont Plea, and that it must be here taken that the Money was paid to the proper use of the Sheriff; and in pleading the matter is to be taken most strongly against him that pleads.

Another matter they went upon is, that in the justification the Defendant saith he detained the Cattle till 11 l. was paid to Francis, whereas the Declaration chargeth him with detaining till 11 l. was paid to the Defendant; and so Francis answers nothing to the payment alledged to himself.

Note,

Note, The Chief Justice cited the Case of Thompson and Clarke, 1 Cro. 504. where 'tis said, that the Sheriff cannot deliver the Defendants Goods to the Plaintiff in satisfaction of the Debt, neither ought they to be delivered to the Defendant against whom the Execution is, but they ought to be sold, and the appraisement is not material for the Goods upon a Fieri facias need not to be appraised as they must be upon Elegit, 1 Cro. 584. in Palmers Case. In the Case of Goodyers and Ince, 2 Cro. 246. upon an Elegit it was held, that the Sheriff could not sell a Term to the Plaintiff himself that took out the Elegit.

Powell was of Opinion, that the Plea was good in that point of paying the Money to the use of the Sheriff, for he hath an interest of special property in the thing taken in Execution, 1 Cro. 639. the Sheriff may bring trespass against one that takes Goods after they are seized in Execution, Wilbraham and Snow, 2 Saunders 47. resolved that in such Case the Sheriff may bring Trover.

But he held the Plea insufficient for the other exception, because the Declaration is of a Detainer till the Money was paid to Francis and the Defendant; And in the Plea the Justification is of the detaining till the Money was paid to Francis.

He took another Exception also, that the Defendant had not shewn that there was a return made of the Warrant to the Sheriff, and cited Br' Tit. Trespass 566. but that was not much insisted upon, because the Warrant was not directed to the Defendant here, but to Francis and another, and the Defendant ought not to be punished for the omission of the Bayliffs in not returning the Warrant. Upon a Mein Proces the Bayliff who acts by a Warrant from the Sheriffs, is not liable in Trespass if the Sheriff does not return the Writ.

Ventris was of Opinion for the Defendant as to the first matter, the payment to the use of the Sheriff he thought ought to be taken upon the whole matter set forth in the Plea, that it was paid to the particular and special use of the Sheriff, viz. that he might have the Money in Court as the Writ commands, and the Warrant mentions, and it was a strained construction to take it to be to the proper use of the Sheriff; it would not have been proper to say, paid to the Bayliff to the use of the Plaintiff, because 'tis not the Plaintiffs Money till 'tis paid to him, in the Case of Benson and Flower, 3 Cro. and Jones 115. it was resolved, that if the Plaintiff became Bankrupt, the Commissioners could not assign the Money that had been levied at the Plaintiffs suit upon Execution, or remaining in the Sheriffs Hands or in Court; a Barr is good to a common intent.

2. The pleading of the payment to Francis, and not said to Francis and the Defendant, tho' it does not precisely answer the Declaration, yet he held it well enough, because payment to Francis is a payment to both, because it is set forth, that they acted jointly in pursuance of the Warrant; and averring that the matters pleaded were *idem residuum transgressionis* was a sufficient answer of the Allegation in the Declaration of payment to both.

He put this Case, one brings Trespass against A. that he simul cum B. took his Cattle and detained them quousque he made a fine with the said A. and B. for the delivery of them. A. the Defendant pleads, that a Rent was granted to B. with a clause of Distress; and that the said B. and A. as his Servant, and by his command took the Cattle by way of Distress, and detained them till the Plaintiff paid the arrear to B. *quæ est eadem transgressio*, Would it not have been good?

Again, If this payment must be taken to be to the proper use of the Sheriff, and so not in pursuance to the Execution, yet he held that the Plaintiff here could not maintain an Action of Trespass, that in regard that he is *particeps criminis*, the detaining the Goods is but a Nonfeasance. If the Sheriff upon *Mefn Process* refuses Bail, this does not make him a Trespasser *ab initio*, tho' he is liable to an Action upon the Case for such refusal; and so is the Case of Salmon and Percival, Jones 226. and 1 Cro. So also if the Sheriff detains a man taken upon *Mefn Process* after a *Superfedeas*, and that appears by Stringer and Stanlacks Case, 1 Cro. 404. and Withers and Henly's Case, 2 Cro. 379. there said the detaining is a new Caption; but it is objected here, that the taking of the Hony is a Misfeasance; and in 6 Co. Poulter's Case, if a man distrain and abuseth the Distress, he is a Trespasser *ab initio*; so where a thing is done by an authority of Law, and an abuse is committed after.

Ans. That is true, if there were a Misfeasance in any matter wherein the Plaintiff in this Action had not concurred: If a man should detain a Horse, and the Owner should bid him ride him, would this make him a Trespasser *ab initio*, as if he had rode him without such licence? The payment is here the Act of the Plaintiff in this Action, and therefore he was of Opinion, that he could not bring Trespass. But by the Opinion of the other Three Judges, Judgment was given *pro Quer.*

Clarke versus Peppin.

Somerset ff. **G**EORGIUS Peppin nuper de Culverton in Com' prædict' Gen'al' die' George Peppin of Culverton in the said County G't. summonitus fuit ad respondend' Edwardo Clarke Armig' Johanni Bowles Armig' & Georgio Mulgrave Armig' executoribus testamenti Will' Clarke Armig' de placito qd' teneat eis conventionem int' eisdem Willielmum & Georgium Peppin in vita ejusdem Willielmi factam juxta vim formam & effectum cujusdam scripti agreement' int' eos confect', &c. Et unde iidem Edwardus Johannes & Georgius Mulgrave per Humfr' Stear Attorn' suum dic' qd' cum per quoddam script' agreement' habit' & fact' apud Camington' decimo septimo die Julii Anno Dom' Millesimo sexcentesimo octogesimo quarto iat' præd' Will' ex una parte & præd' Georg' Peppin ex altera parte sub sigillo præd' Georg' Peppin signat' & hic in Cur' prolat' cujus dat' est eisdem die & anno agreeat' fuit int' easdem partes pro una dimissione pro annis (Anglicè, a Chattle Lease) pro nonaginta novem annis ad incipiend' (Anglicè, to commence) post mortem vel al' determinationem status Ux' Christoferi Melhuish decessi & ad determinand' super mortem Eliz' Peppin ætat' (Anglicè, aged) circa decem & septem annos filiz' præd' Georgii Peppin ac Johannis Peppin filii Johannis Peppin de Culverton præd' ætat' (Anglicè aged) circa duodecim annos de & in omni ill' uno mesuagio & tenemento cum pertinen' continen' circa viginti & septem acras de quibus quatuor sunt pratum nuper in possessione præd' Christoferi Melhuish & parcel' manerii de Curry Pool sub antiquo annual' reddit' viginti & septem solidorum & quatuor denar' & pro Herriotto (Anglicè, an Herriot) optimo averio vel quatuor libris ad Dom' electionem & usual' covencon' ut in omnibus dimissionibus (Anglicè, Leases) concessis per fiduciarios (Anglicè, Trustees) constitut' per nuper Comitem Rossen omnium quorum consideratione præd' Georgius Peppin pro se Executoribus Administratoribus & Assign' suis convenit promisit concessit & agreeavit ad & cum præd' Willielmo Executoribus & Assign' suis qd' ipse Georgius Peppin Executores Administratores vel Assign' sui solverent vel solvi causarent præd' Willielmo Executoribus vel Assign' suis plenam summam centum & octoginta librarum videlicet unam medietat' inde ad Festum Sancti Michaelis Archi tunc prox' post dat' scripti illius & altam medietat' ad Festum sancti Michaelis Archi tunc prox' sequen' proviso qd' si Ux' præd' Christoferi contingeret mori ante sigillationem præd' designat' dimissionis (Anglicè, intended Lease) qd' tunc script' ill' vacuum foret Accciam proviso qd' si aliqua supramentionat' vitarum contingeret mori antequam præd' designat' dimissio sigillat' foret qd' tunc licitum foret ad & pro præd' Georgio Peppin Executoribus Administratoribus & Assign' suis

Executors bring Covenant, reciting an Agreement for a Chattle Lease under a Rent and Covenant. The Defendant pleads that the Testator Nihil habuit in Tenementis, &c. Scriptum agreementi.

The Agreement set forth.

*Literæ Plain-
riff Testator
performed all
the Covenants,
&c.*

*Protestants that
the Defendants
have not kept
them.
The Breach af-
firmed.*

Et sic, &c.

*Protest in Cur.
Literas Testa-
mentarias.*

*Testator nihil
habuit in Ten-
ementis.*

*Demurrer to
the Plea.*

fuis nominare & appunctuare aliquam al' personam in loco talis personæ sic obien' Et iidem Edwardus Johannes Bowles & Georgius Musgrave ulterius dic' qd' licet ipse præfat' Willielmus in vita sua & præd' Edwardus Johannes Bowles & Georgius Musgrave post mortem ipsius Will' perimplever' & custodiver' omnia & singula agreement' & convention' in script' præd' spec' ex parte sua perimplend. & custodiend. Protestando etiam qd. præd. Georgius Peppin non perimplevit nec custodivit aliqua agreement sive conventiones in scripto præd. superius spec. ex parte sua perimplend. & custodiend. in facto iidem Edwardus Johannes & Georgius Musgrave dic. qd. præd. Ux. præd. Cristofori adhuc superstes & in plena vita existit videlicet apud Camington præd. qd'q; præd. Georgius Peppin non solvit præfat. Willielmo in vita sua seu eisdem Edwardo Johanne & Georgio Musgrave post mortem præd. Willielmi præd. centum & octoginta libras videlicet unam medietat. inde ad Festum Sancti Michaelis Archi prox. post dat. script. illius & alteram medietat. inde ad Festum Sancti Michaelis Archi tunc px. sequen. Et sic iidem Georgius Johannes & Georgius Musgrave dic. qd. pd. Georgius Peppin conventionem suam pd. nec cum pfat. Willielmo in vita sua nec eisdem Edwardo Johanne & Georgio Musgrave post mortem pfat. Willielmi in hac parte factam tenuit set. il. penitus infregit ac il. pfat. Willielmo in vita sua & eisdem Edwardo Johanne & Georgio Musgrave post mortem pfat. Willielmi tenere contradixit & adhuc contradic. unde dic. qd. deteriorat. sunt & dampnum habent ad valenciam ducentarum librarum Et inde pduc. sectam, &c. & pferunt hic in Cur. Literas Testamentar. pfat. Willielmi p quas satis liquet Cur. hic ipsos Edwardum Johannem & Georgium Musgrave fore Executores Testamenti pd. Et inde habere Administracionem, &c.

Et pd. Georgius Peppin p Thomam Webber Attorn. suum ven. & defend. vim & injur. quando, &c. Et dic. qd. pd. Edwardus Clarke Johannes Bowles & Georgius Musgrave actionem suam pd. inde versus eum habere seu manutenere non debent quia dic. qd. pd. Will. Clarke defunct. pd. tempore quo supponitur pd. conventionem fieri nec unquam postea nichil habuit in tenementis pd. p ipsum Willielmum p script. agreement. pd. sic ut præfertur dimitti agreeatum Et hoc parat. est verificare unde pet. Judicium si præd. Edwardus Clarke Johannes Bowles & Georgius Musgrave actionem suam præd. inde versus eum habere seu manutenere debeant, &c.

Et præd. Edwardus Johannes Bowles & Georgius Musgrave dic. qd. placitum præd' Georgii Peppin superius in Barram placitat' ac materia in eodem content' minus sufficien' in lege existit ad ipsos Edwardum Johannem & Georgium Musgrave ab actione sua præd' versus præfat' Georg' Peppin habend' præcludend' qd'q; ipsi ad placitum ill' modo & forma præd' placitat' necesse non habent nec p legem terræ tenentur respondere & hoc parat. sunt verificare unde per'

pet' Judic' & dampna sua præd' occasione fractionis conventionis præd' sibi adjudicari, &c.

Et præd' Georgius Peppin ex quo ipse sufficiens materiam in lege ^{Joyder in De.} ad præfat' Willielmum Johannem & Georgium Musgrave ab actione ^{mitter.} sua præd' versus ipsum Georgium Peppin habend' præcludend' superius placitat' inde allegavit quam ipse parat' est verificare quam quidem materiam præd' Edwardus Johannes & Georgius Musgrave non dederunt nec ad eam aequalit' responder' set verificationem ill' admittere omnino recusant ut prius per' Judic' Et qd' præd' Edwardus Johannes & Georgius Musgrave ab actione sua præd' habend' præcludantur, &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judic' inde reddant dies dat' est partibus præd' usq; a die Sancti Martini in xv dies de audiendo inde iudicio suo eo qd' idem Justic' hic nondunt, &c.

Clarke versus Peppin.

IN an Action of Covenant the Plaintiff declared, that whereas by an Agreement in writing made between him and the Defendant, it was agreed between the said Parties for a Demise of a Lease for 99 years, of, and in a certain Messuage, &c. under a certain Rent, and the usual Covenants as in all Demises granted by the Trustees of the Earl of Rochester were used, omnium quorum consideratione, the said Peppin did agree to pay to the said Clarke 180 l. at Michaelmas next following, and licet the Plaintiff performed all of his part, the Defendant had not paid the Money, &c.

The Defendant pleaded in bar, that the Plaintiff tempore quo supponitur præd' conventionem nec unquam postea nihil habuit in Tenementis præd', so agreed to be demised.

To this the Plaintiff demurred, and Judgment by the whole Court was given for the Plaintiff; for tho' that may be pleaded in an Action for Debt for Rent, yet it cannot be pleaded in Covenant for a sum in gross.

Besides, the Agreement does not necessarily import that the Lease should be made by the Plaintiff; it may be understood, that it was agreed he should procure a Lease for the Defendant.

Pinager *versus* Gale.

In an Action of Trespals the Plaintiff, declared for the taking of his Cattle, and detaining them till he was forced to pay 2 l. 8 s. and 2 d.

The Defendant justified, that J. S. levied Plaint in the County Court in a Plea of Debt of 39 s. 11 d. against the now Plaintiff, & superinde taliter processum fuit, that he recovered the said Debt, and 8 s. and 4 d. for Costs of Suit, prout per processum inde in Cur' Com' prædict' remanen' plenius apparet & super quo ad prosecutionem ipsius J. S. quoddam præceptum extra Cur' Com' prædict' emanavit, per quod præceptum the Sheriff commanded the Defendant to levy the Money, &c. by virtue of which Precept he took the Cattle, and detained them till the Plaintiff paid the Money, &c.

The Plaintiff demurred, and it was adjudged for the Plaintiff.

First, Because when a Judgment is pleaded in an inferior Court, especially in a Court not of record the proceedings should be set forth at large, and not to say taliter processum fuit.

Secondly, It is not shewn that the Debt arose within the Jurisdiction.

Thirdly, It doth not appear that the Court awarded the Precept, 'tis only said quoddam Præceptum è Cur' emanavit per quod the Sheriff commanded, whereas the Justices are the Judges; for it should be per quod præceptum per præfat' Cur' directum fuit, &c. Vide Rastalls Entries in Trespals, 669. and as to the setting forth the proceedings at large.

Prynne

Prynne versus Sloughter.

ALIAS prout patet Termino Sancti Michaelis ult' præterit' Rotulo DCCLXXIV. continetur sic London s^r. Præceptum fuit Vic' Cum Robertus Prynne generosus nuper in Cur' domin' Caroli Secundi nuper Regis Angl', &c. scilicet Termino Sanctæ Trinitatis Anno regni sui decimo nono coram Orlando Bridgman Mil' & Baronetto & sociis suis tunc Justic' dicti nuper Regis de Banco hic scilicet apud Westm' per consideracon' ejusdem Cur' recuperasset versus Willielm' Wormell nuper de London' Armig' alias dict' Willielm' Wormell de Spittlefield in dicto Com' Midd' Armig' tam quoddam debitum Ducentarum librarum quam octoginta solid' quam eidem Roberto in eadem Cur' dicti nuper Regis adjudicac' fuer' pro dampnis suis quæ habuit occasione detentionis debiti illius unde convict' est prout per recordum & processum inde in Cur' domini Regis nunc de Banco hic residen' liquet manifeste Execut' tamen Judic' prædict' adhuc restat faciend' ac prædict' Willielmus mortuus est prout ex insinuatione prædicti Roberti acceperat Rex Et quia, &c. quod per probos, &c. Scire fac' tenentibus terrarum & tenementorum quæ fuer' prædicti Willielmi in Octabis sanctæ Trinitatis Anno regni dicti nuper Regis decimo nono supradicto quo die Judicium prædict' reddit' fuit vel unquam postea in Balliva sua quod essent hic à die sanctæ Trinitatis in tres Septimanas ult' præterit' ostens. si quid, &c. quare debitum & dampna prædicta de terris & tenementis illis fieri & præfat' Roberto reddi non deberent juxta formam recuperacon' prædict' si, &c. ad quem diem hic ven' prædict' Robertus per VVillielm' Mantell Attorn' suum Et op' se quarto die versus præfat' tenentes de præd' placito Et ipse solempnit' exact' non ven' Et Vic' videt Joha' Parsons Miles & Basilius Firebrace Miles modo mand' qd' nulli sunt tenentes nec aliquis est tenens aliquar' terrar' seu tenitor' fuer' prædicti VVillielmi in prædict' Octab' sanctæ Trinitatis Anno decimo nono supradicto vel unquam postea in Balliva sua quibus vel cui Scire fac' possunt prout per breve illud eisdem Vic' præcept' fuit Et super hoc testat' est in eadem Cur' Regis hic quod sunt sepeal' tenentes diversorum terrarum & tenementorum in Com' Norf. quæ fuer' prædicti VVillielmi in eisdem Octab' sanctæ Trinitatis Anno decimo nono supradicto & postea unde debitum & dampna prædicta fieri & levare possunt Ideo Præcept' est Vic' Norf. quod per probos, &c. Scire fac' tenentibus terrarum & tenitorum quæ fuer' prædicti VVillielmi in prædict' Octab' sanctæ Trinitatis Anno regni dicti nuper Regis decimo nono supradicto vel unquam postea in Balliva sua quod essent hic ad hunc diem scilicet à die sancti Michaelis in tres Septimanas ad ostend' in forma prædicta, &c. Et modo hic ad hunc diem ven' tam prædictus Robertus per Attorn' suum

Scire facias
against Heir
and Tertenants,
the Defendants
Tertenants
appear and
plead that there
are Lands in
another
County.

*The Plaintiff
obtaliz se.*

*The Sheriffs of
London Return,
That there are
no Tertenants.*

*Testatum scire
fac'.*

Plaintiff and
Tertenants
appear.
Scire fac' Re-
tained.

Nulli alii
tenentes.

Special Impar-
lance.

Loquela Revi-
ficat' continuat'
& adjournat'
fuit per actum
Parliamenti.

Uterius special
Imparlance.

The Plaintiff
prays Execu-
tion.
Tertenants
plead in abate-
ment of the
Writ.

suum prædict' quam Paris Slougher per Henr' Clift Attorn' suum
Et super hoc Vic' prædict' Com' Norf. videlicet Thomas Seaman
Armig' modo mand' quod ipse virtute brevis prædicti sibi directi per
VVillielm' Dicker & Johannem Scott probos, &c. Scire fac' præfat'
Paris Slougher tenenti undecim Messuagiorum cum pertin' in Lin-
Regis in Com' suo modo vel nuper in sepealibus possessionibus sive
occupation' Ezekielis Goddard Elizabethæ Tilson Vid' Everardi
Farthing Johannis VVilson Roberti Edwards Georgii Burnett Johan-
nis VVilliamson VVillielmi Melton VVillielmi Cobb Susan' VVest-
gate & Janæ Kurry Vid' & unius repositori (Anglicè a Ware-
houst) modo vel nuper in possessione sive occupatione Nicholai
Rookes quæ quidem sepal' messuagia & repositorium fuer' tenementa
præd' VVillielmi VVormell in prædict' Octab' sanctæ Trinitatis Anno
decimo nono supradicto & postea quod essent hic ad hunc diem scilicet
prædict' tres Septimanas sancti Michaelis ad ostendend' si quid &c.
quare debitum & dampna prædict' de tenementis illis fieri & præfat'
Roberto Prynne reddi non deberent juxta formam recuperationis
prædictæ prout per idem breve sibi præcept' fuit quodque non sunt
aliqui alii tenentes nec est aliquis alius tenens aliquarum terrarum
sive tenentorum quæ fuer' prædicti Willielm Wormell in prædictis
Octab' sanctæ Trinitatis Anno decimo nono supradicto vel unquam
postea in balliva sua quibus vel cui Scire fac' potest Super quo
prædict' Robertus Prynne per' executionem versus præfat' Paris
de debito & dampnis prædictis de eisdem tenementis cum pertin'
levand' sibi adjudicari, &c.

Et prædict' Paris salvis sibi omnibus & omnimod' exceptionibus
& advantag' tam ad prædict' breve quam ad prædictam narracon'
per' licent' inde interloquend' hucusque in Octab' sancti Hillarii Et
habet, &c. idem dies dat' est præfat' Roberto hic &c. Posteaque
scilicet à die Paschæ in quindecim dies de quo die loquela prædicta
antea remanen' sine die virtute cujusdam Actus Parliamenti domini
VVillielmi & dominæ Mariæ nunc Regis & Reginæ Angl' &c.
tertio die Februarii Anno regni sui primo revivicar' continuat' &
adjornat' fuit hic ven' tam prædict' Robertus Prynne quam prædict'
Paris pro Attorn' suos prædictos Et super hoc idem Paris salvis sibi
omnibus & omnimod' exceptionibus & advantag' tam ad breve
quam ad narration' prædict' ulterius per' licent' inde interloquendi
hic usque in Crastino sanctæ Trinitatis Et habet, &c. Idem dies
dat' est præfat' Roberto Prynne hic &c. Et modo hic ad hunc diem
scilicet ad prædict' Crastin' sanctæ Trinitatis ven' tam prædictus
Robertus Prynne quam prædict' Paris per Attorn' suos prædictos
Et super hoc idem Robertus Prynne ut prius per' execution' versus
præfat' Paris de debito & dampnis prædictis de tenementis prædictis
cum pertin' levand' sibi adjudicari, &c. Super quo prædict' Paris
per' Judic' de prædicto brevi de Scire fac' Vic' prædict' Com' Norf.
direct' quia dic' quod diu ante emanac'on' ejusdem brevis de Scire fac'
&

& tempore emanation' inde quidam Georgius Underwood & Jeremias White seisit' fuer' & adhuc seisit' existunt de duobus Messuagiis cum pertin' in paroch' de Thames Ditton in Com' Surr' ultra & prædict' tētra in prædicto retorno ejusdem brevis de Scire fac' superius specificat' de quibus quidem duobus Messuagiis cum pertin' prædict' Willielm' Wormell seisit' fuit in dominio suo ut de feodo in prædict' Octab' sanctæ Trinitatis Anno decimo nono supradicto Et hoc parat' est verificare unde ex quo prædicti Georgius & Johannes non sum' fuer' nec in eodem brevi de Scire fac' nominat' nec in prædicto retorno ine retornat' tenentes prædictorum duorum Messuagiorum cum pertin' vel aliquor' tenementorum quæ fuer' prædicti Willielmi Wormell prædicto tempore redditionis Judicii prædicti idem Paris per' Judic' de brevi illo Et quod idem breve cassetur, &c.

Lands in another County.

Unde ex quo the Tenants of these Lands were not summoned petit Judicium de brevi.

Et prædictus Robertus dic' quod prædict' placitum prædict' Paris superius in forma prædicta placitat' ac materia in eodem content' minus sufficien' in lege existunt ad prædict' breve de Scire fac' præfat' Vic' Norf. direct' cassand' vel ad ipsū Robertum ab executione sua versus præfat' Paris de debito & dampnis prædict' levand' de terris & tētis prædict' cum pertin' unde idem Paris tenens ut præfertur retornat' existit repellend' seu retardand' quodque ipse ad placit' illud modo & forma prædict' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' placiti prædicti Paris in hac parte idem Robertus petit Judicium & quod breve suum prædict' bon' adjudicetur necnon execution' suam versus præfat' Paris de debito & dampnis prædict' de terris & tenementis prædict' cum pertin' unde dictus Paris tenens ut præfertur retornat' existit levand' sibi adjudicari, &c.

Demurrer to the Plea.

Et prædictus Paris ex quo ipse sufficien' materiam in lege in placito suo prædicto ad prædict' breve de Scire fac' præfat' Vic' Norf. direct' cassand' & ad prædict' Robertum ab executione sua prædicta retardand' superius allegavit quam ipse parat' est verificare quam quidem materiam prædictus Robertus non dedic' nec ad eam aliqualit' respondit sed verification' illam admittere omnino recusat Unde ut prius per' Judic' de brevi prædict. Et quod idem breve cassetur, &c. Et quia Justic' hic se advisari volunt de & super præmissis priusquam Judic' inde reddant dies dat' est partibus prædict' hic usque à die sancti Michaelis in tres Septimanas de audiendo inde Judicio suo eo quod Justic' hic inde nondum, &c.

Joynder in Demurrer.

Prynne versus Sloughter.

In a Scire facias upon a Judgment recovered in Trinity Term, Anno 19 Car. 2. nuper Regis in this Court, against William Wormell Esq; in 200 l. Debt, to warn the Certenants of the said Wormell, if they could shew any thing why Execution should not be, &c. which was directed to the Sheriffs of London, who returned that there were no Certenants in their Bailiwick, upon which a Testatum scire fac' went to the Sheriff of Norfolk to warn the Certenants there, and the Sheriff returned the said Sloughter Tenant of a Messuage, &c. which the said Wormell was seised of at the time of the Judgment, and that there was no other Certenants in balliva sua.

Sloughter appeared, and demanded Judgment of the Writ of Scire fac' quia dicit quod diu ante emanationem ejusdem brevis & tempore emanationis inde quidam Geo. Underhill & Jer. White were and still are seised of two Messuages, &c. in Thames Ditton in the County of Surry, ultra & præter Tenementa prædict' in retorno ejusdem brevis de Scire fac' superius specificat', of which the said Wormell was seised, &c. Unde ex quo præd' Georgius & Jeremias non summon' fuer' nec in eodem brevi de Scire fac' nominat' nec in prædict' retorno inde retornat' tenentes, &c. idem Sloughter petit Judicium de brevi illo & quod idem breve cassetur.

To this Plea the Plaintiff demurred, and Serjeant Pemberton Argued, that it was no Plea in Scire fac' to say that there were Certenants in another County than where the Scire facias was brought, tho' it might be if the Tenants were in the same County. Especially this Plea is not to be admitted since the Statute of 16 & 17 Car. 2. c. 5. which was made to prevent delay of Execution upon Judgments, Statutes and Recognizances; and Enacts, that when any Judgment, &c. shall be extended, the same shall not be delayed or avoided by occasion, that any part of the Lands and Tenements extendible, are or shall be omitted out of such Extension, saving the Remedy for Contribution against such persons as shall have any of the Lands extendible. Which Statute was at first temporary, and made perpetual by 22 & 23 Car. 2. cap. 2.

The Court were of Opinion, that as to the Matter of the Plea, that it might be pleaded. And when one Certenant is Returned summoned upon a Scire fac', he may plead that there are other Certenants, tho' in another County; and this will put the Plaintiff to take out a Scire facias against them. Vid. so; that the Lady Greshams Case, Mo. 429. and Clarke and Hardwick's Case Mo. 524. Vid. Dy. 331 B. semble Cont. In a Scire fac' so; a Certenant in the nature of an Audita Querela, it was held,

held, that the Certenant returned Could not plead, there was another Certenant not warned. Vid. 1 Roll. Rep. 57. Holland and Lee, it seems to be made a Doubt.

But the whole Court held, that such Matter might be pleaded, and the Statute of 22 & 23 Car. 2. does not extend to this Case; for that is when an Extent is executed, and the Certenant brings an Audita querela, he shall not oblige the Plaintiff to extend anew, but the Extent shall stand, and he shall have Contribution against the rest.

But the Pleading in this Case was altogether ill and insufficient; for it is pleaded in Abatement of the Writ, which it ought not to be, but he should have demanded Judgment, *si ipse ad breve pced' in forma pced' retorn' respondere compelli debeat*; and so is the Conclusion in Jefferson and Dawson's Case, 2 Sand. 23. and in Clarke's Case in Mo. 524.

And then he sheweth, that the said George and Jeremy were not summoned, nec in eodem brevi de Scire fac' nominat' nec in eodem retorno retornat', which is naught; for the Sheriff of Norfolk could not summon or return those Tenants, being in another County.

But then it was shewn on the part of the Defendant, that the Record of the Scire fac' was wrong, for it was tituled Alias prout patet Term Sancti Michaelis ultimo preterito, and then sets forth a Scire facias to the Sheriffs of London, Returnable tres septiman' Trin. ultimo preterito; who Returned, that there were no Tenants in Balliva sua, & super hoc Testatum est in Cur' Regis hic, that there were several Tenants in the County of Norfolk; and upon that a Scire facias was awarded to the Sheriff of Norfolk, Returnable tres Michael', &c. So by this Record it would seem, the Writ and Return is all the same day, whereas the Testatum scire fac' ought to be in Trinity Term before; and therefore the Record should have been tituled Alias prout patet Term Sancte Trinitar'.

And this the Counsel for the Plaintiff prayed might be amended; but the Court would not permit it, unless they agreed to amend on both sides.

The City of Oxford's Case.

A Townsman of Oxford was chosen into an Office in the Incorporation, and refusing to hold he incurred a Penalty according to the Usage of this place, for which an Action of Debt was brought.

And it was moved for the Defendant, that he might be allowed the Privilege of the University; and a Charter was shewn, where by it was granted to the University, that their Members, Servants, &c. belonging to the University, should be sued in the Court before the Vice-Chancellor, and not elsewhere. And a Certificate was produced from the Chancellor of Oxford, directed to the Chief Justice, & Sociis suis Justiciariis de Banco, that the party was Matriculated and Registered in the University, and a Servant to Doctor Irish.

And after hearing Counsel, and it appearing to the Court, that he was Registered in the University but two days before he was Chosen into the Office, and was a Painter that had dwelt long in the Town, and been for many years of the Corporation, and no Servant attendant to Dr. Irish, but had his Dwelling-house, and kept Shop in the Town; and that he procured himself to be admitted in the University as an Artificer to hinder the Remedy the Town had against him for not holding his Office.

The Privilege was denied by the whole Court.

Bond *versus* Moyle.

In an Action of Debt for 28 l. 2 s. and 4 d. the Plaintiff declared, that whereas the Defendant by a certain Bill Obligatory, cognovisset se debere & indebitar' fore to the Plaintiff, summam viginti & octo librarum duorum solid' & quatuor denar' solvere Querenti, &c. ad vel super vicesimum nonum diem Septembris qui foret anno Dom. 1685. pro vera solutione quatuordecim librar' unius solidi & quatuor denar' ipse the Defendant obligasset se firmiter per eandem billam, and in facto dicit quod the said Moyle non solvit Querenti the said 14 l. 1 s. and 4 d. upon the said 29th of September, per quod actio accrevit.

To this the Defendant Demurred, and it was Adjudged for the Plaintiff; for tho' it is not drawn properly as a Penal Bill for the payment of the 14 l. &c. yet there is enough to ground an Action of Debt for the 28 l. 2 s. and 4 d. and the Day of payment seems to refer to the 28 l. 2 s. and 4 d. Vid. 1 Cro. 771.

Note,

Note, 'Tis the common course to declare in Communi Banco per scriptum indentat', without saying, sigillo sigillat'; but 'tis otherwise in B.R.

Buckler *versus* Millerd.

THE Plaintiff Buckler and two others, Executors of Peter Becket, brought Debt upon a Bond of 100 l. which the Defendant (together with one Katherine Becket) had entered into to the Testator.

The Defendant demanded Oyer of the Condition, which was, (*Viz.*) That if the above bound Katherine Becket, and James Millerd, should yearly, during the Life of the said Peter Becket and the minority of Mary Becket, pay unto the said Peter Becket, or his Assigns, the sum of Twelve pounds by equal payments, upon the 15th day of August and the 15th day of February, that then the Bond should be void.

The Defendant pleaded Actio non, for that upon the 15th of February, when the Bond was alledged to be made, and before the sealing thereof, the said Peter Becket (being Grandfather to Mary Becket in the Condition mentioned) who was then within Age, did deliver to the Defendant and the said Katherine Becket, 200 l. to the use of the said Mary, to be paid to her when she should be One and twenty years of Age. And it was then agreed, that the Defendant and the said Katherine Becket should give a Bond in 200 l. penalty to the said Peter Becket: And it was also then agreed, that the Condition should be for the payment of 12 l. yearly for the Interest thereof to the said Peter and his Assigns during the minority of the said Mary, if the said Peter should so long live; at the two days mentioned in the said Condition, by equal portions; and if it should happen that the said Peter should dye before the said Mary should be One and twenty, that then the said 12 l. Interest should remain in the hands of the Defendant and the said Katherine, for the use of the said Mary, to be paid to her when she should come to 21 years of Age; and then to be paid to the said Mary. And the Defendant further saith, that after the Bond and Condition were so agreed, one Yeomans by mistake wrote the Obligation as is in the Bond, upon which the Action is brought; and the said Defendant and Katherine not knowing the Mistake, sealed the said Bond prout; and that the said Peter Becket afterwards died, and that only the first day of payment incurred between the date of the said Bond and the death of Peter Becket, (*viz.*) the 15th day of August, anno tertio Jacobi Regis. And the Defendant on the said 15th day, (Six pounds being all that was then due to the said Peter Becket) at S. obtulit

p s

solvere

solvere, and was ever after ready to pay it to him; and after, scilicet, the first day of December, anno tertio supradicto, did pay to the said Peter Becket the said Six pounds, which he did accept, unde petit Judicium, &c.

The Plaintiff replied Protestando, that there was no such Agreement, and that the said Mary Becket was still living and under Age, and that Six pounds became due upon the 15th of February, anno quarto nuper Regis Jacobi, according to the said Condition; which the Defendant had not paid, & hoc paratus est verificare, &c.

To this the Defendant demurred, and it was insisted on for the Defendant that this Agreement might be pleaded, and averred to shew the meaning of the parties, and to have the Condition taken accordingly. As the Case of Nevison and Whitley in the 3 Cro. and in Jones Rep. 396. where the Condition of the Bond was for payment of Interest at Six months, as much as the Statute allows for a year, and it was shewn to be made so by the Mistake of the Scrivener, and that the Agreement of the parties was for no more than just Interest; and this was held a good Averment to save the Bond from being void by the Statute of Usury. And a Case between Lewknor and Mountague was cited, where the Condition of a Bond was, If William Mountague shall do, &c. whereas there was William Mountague the Father and William Mountague the Son, and by the Averment of the meaning of the parties this was expounded of the Son.

But the whole Court were here of Opinion, that the Averment in the Case at Bar was not to be admitted; for it would carry the Condition to another sense than the words import.

As to the Case upon the Statute of Usury, there it depends upon the Agreement; and the party may shew any to make appear there was no Corrupt Agreement. Vid ante, hoc Termino the Case of Bush and Buckingham. And as to Lewknor's Case, the Averment was but to ascertain which William Mountague was meant, and stands well with the words of the Condition. But whether, as the Condition is penned, for the payment to be during the Life of Peter Becket and the Minority of Mary, that the payment should determine upon the death of Peter, the Court did not deliver their Opinion (according to the Opinion in Brudnell's Case in 5 Co. 9. it would seem that it should. But the Case of Cross and Tooker in Latch. 162. seems strong to the contrary. Vid. that Case in Popham 201. and in 1 Anderson 151. absque impetitione vassi during their Lives, held, that the Privilege shall continue to the Survivor.)

But

But the whole Court held the pleading of the tender insufficient, because it is not said that Peter Becket refused; otherwise if a place of payment had been in the condition, and it had been shewn in pleading, that the party which was to receive the Pony, was not there, 1 Cro. 888. Plea of tender without setting forth a refusal, not good, Lea and Exellies Case: And the acceptance after the day signifies nothing, and upon that point the Court were of Opinion for the Plaintiff, but Judgment was not given, because the parties shewed an inclination to compose the business.

Mason *versus* Watkins.

AN Action of Debt upon a Bond of 20 l. The Defendant demanded Oyer of the Condition, which was, that the Obligor should not himself bring any Evidence at the Assizes to prove the two Cows now in question between one Owen Mason the younger, and the said Watkins, to be the Cows of the said Watkins or of Robert Gillo, and that the said Gillo shall set in a Bill of Ignoramus, that then the Bond should be void.

The Defendant pleaded quod ipse de deb' prædict' virtute Scripti Obligat' prædict' onerari non debet, because that one of the said Cows was the Cow of the said Watkins, and the other of the said Gillo; and that before the Bond, Owen Mason jun. in the said Condition mentioned, being the Plaintiffs Son, stole the said two Cows, and was imprisoned thereupon; and the Defendant Watkins was bound by Recognizance to prosecute him at the Assizes for the said felony; and there the said Mason jun. was indicted and convicted, and the Defendant did give Evidence that one of the Cows was his, prout bene licuit, and that the Defendant did not give any Evidence by himself, or any one else to prove the two Cows to be the Cows of the Defendant, or the Cows of the said Gillo, & hoc paratus est verificare, &c. unde petit judicium, &c.

To this the Plaintiff demurred, and upon the first opening, Judgment was given for the Defendant, for the Condition is against Law, viz. to shift off evidence of felony, and that makes the Bond void, vide Jones's Case, 1 Leon. 203. and the Court recommended it to Serjeant Pawlet who was a Judge in Wales where the Plaintiff lived, to see to have him prosecuted for taking such a Bond.

Termino Sancti Hillarii, Anno

1 & 2 W. & M.

In Communi Banco.

Trippet *versus* Eyres.

Debt upon a
Bond to per-
form an Award.

Lond' ff. JOHANNES Eyre nuper de Sheffeld Mannor in Com' Eborum Gen' al' dict' Johannem Eyre de Sheffeld Mannor in Com' Eborum Gen' summonitus fuit ad respondend' Burrowes Trippet Gen' de placito qd' reddat ei trecentas libras quas ei debet & injuste detinet, &c. Et unde idem Burrowes p Rich. Milward Attorn' suum dic' qd' cum prædict' Johannes nono die Marcii Anno Regni Domini Regis nunc tercio apud London' in Paroch' beatæ Mariæ de Arcubus in Warda de Cheap p quoddam Scriptum suum Obligatorium concessisset se teneri eidem Burrowes in prædict' trecentis libris solvend' eidem Burrowes cum inde requisit' fuisset prædict' tamen Johannes licet sæpius requisit' prædict' trecentas libras eidem Burrowes nondum reddidit set ill' ei hucusq; reddere contradixit & adhuc contradic' unde dic' qd' deteriorat' est & dampnum habet ad valentiam centum librarum Et inde pduc' Sectam, &c. Et pferit hic in Cur' Scriptum prædict' Quod debitum prædict' in forma prædict' testatur cujus dat' est die & anno supradictis, &c.

The Defendant
craves Oyer of
the Condition.

Et prædict' Johannes p Johannem Gatacre Attorn' suum ven' & defend' vim & injur' quando, &c. Et per' audit' Scripti prædicti & ei legitur Per' eciam audit' conditionis ejusdem Scripti & ei legitur in hæc Verba. *ff. The Condition of this Obligation is such, That if the above-bownden John Eyre, h's Heirs, Executors and Administrators, for his and their parts and behalfs, do in all things well and truly stand to, obey, abide, perform, fulfill and keep the Award, Order, Arbitrament, final End, and Determination of Francis Barlow of Sheffeld in the said County Gent. and Robert Soresby of Sheffeld aforesaid Gent. Arbitrators, indifferently named, elected and chosen, as well on the part and behalf of the above-bownden John Eyre, as of the above-named Burrowes Trippet to Arbitrate, Award, Order, Judge and Determine of and concerning all and all manner of Action and Actions, Cause and Causes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controversies Cres-
passes*

passes, Damages and Demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending by or between the said Parties, or either of them; so as the said Award be made and put in Writing, or by word of Mouth, on or before the ninth day of April now next ensuing; but if the said Arbitrators do not make such their Award of and concerning the Premises, by the time aforesaid; that then if the said John Eyre his Heirs, Executors and Administrators, for his and their parts and behalfs, do in all things well and truly stand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, Umpirage, final End and determination of such Umpire as the said Francis Barlow and Robert Soresby shall nominate between the said Parties of and concerning the Premises, so as the said Umpire do make his Award or Umpirage of and concerning the Premises by Writing or word of Mouth, on or before the sixteenth day of April aforesaid, then this Obligation to be void, or else to remain in full force, strength and virtue. Quibus lectis & auditis idem Johannes Eyre dicit quod predictus Burrowes Trippett actionem suam predictam inde versus eum virtute scripti obligatorii præd' hic in Cur' plac' habere non debet quia dicit quod præd' Franc' Barlow & Rob' Soresby in conditione præd' superius mentionat' post consecutionem Scripti Obligatorii præd' hic in Cur' plac' & infra tempus præd' in conditione præd' in ea parte limitat' nullum fecer' Arbitrium Ordinem Arbitramentum final' finem vel determinationem in Scriptis vel per verbum oris de & super præmissis in Conditione prædicta superius mentionat' inter præfat' Burrowes Trippet & prædict' Johannem Eyre Et prædict' Johannes Eyre ulterius dicit quod prædict' Franciscus Barlowe & Robertus Soresby post consecutionem Scripti obligatorii præd' hic Cur' prolat' & infra tempus Conditione prædictæ in ea parte limitat' scilicet decimo die Aprilis anno tertio supradicti apud London' prædict' in paroch' & Warda prædictæ nominaver' quendam Franc' Jessopp Antefore Umpirator' inter prædict' Burrowes Trippet & præfat' Johannem Eyre de & super præmissis prædictis quodque prædict' Franc' Jessopp sic ut præfertur Umpirator nominat' infra tempus ei Conditione prædictæ in ea parte limitat' nullum fecer' Arbitrium sive Umpiragium aut determinationem de & concernen' præmissis præd' per Scriptum vel verbum oris Et hoc parat' est verificare Unde per' Judicium si prædict' Burrowes Trippet actionem suam prædictam inde versus eum virtute scripti Obligatorii prædictæ habere debeat, &c.

Et prædict' Burrowes dicit quod ipse per aliqua præallegat' ab actione sua præd' versus præfat' Johannem habend' præcludi non debet quia dicit quod bene & verum est quod prædicti Franciscus & Robertus in Conditione prædictæ superius nominat' post consecutionem scripti Obligatorii præd' & infra tempus prædictæ in Conditione prædictæ in ea parte limitat' nullum fecer' arbitrium Ordinem arbitri

Defendant
pleads that the
Arbitrators
made no Award.

But they named
an Umpire, who
made no Award
in Writing,
or by
word of Mouth.

The Plaintiff
Replics and
says, That true
it is that the
Arbitrators,
nor A. B. by
them first
chosen Umpire,
made no
Award; but
they say, that
afterwards
the Arbitrators
chose one J. N.
who made an
Award.

tra A. 10.

tramentum final' finem vel determinationem in scriptis per verbum oris de & super præmissis in Conditione prædicta superius mentionat' int' præfat' Burrowes & prædict' Johannem Eyre ac qd' præd' Francisc' Barlowe & Robertus Soresby ante decimum sextum diem Aprilis in Conditione prædict' mentionat' scilicet die & loco in placito præd' mentionat' nominaver' prædict' Franc' Jessopp Ar' fore Umpiratore inter præd' Burrowes & præfat' Johannem sed præd' Burrowes ulterius dic' quod prædict' Franc' Jessopp adtunc & ibidem fore Umpirator' int' eundem Burrowes & præfat' Johannem de & super præmiss. penitus recusavit Et superinde prædict' Francisc' Barlowe & Robert' postea adtunc & ibidem scilicet prædicto decimo die Aprilis Anno tertio supradicto apud London' præd' in paroch' & Warda præd' nominaver' quendam Cornel' Clarke Armig' fore Umpirator' int' prædict' Burrowes & præfat' Johannem Eyre de & super præmiss. præd' Et idem Burrowes ulterius dic' quod præd' Cornelius postea & ante præd' decim' sextum diem Aprilis in Conditione præd' mentionat' scilicet quartodecimo die Aprilis anno tertio supradicto apud London' præd' in paroch' & Warda prædict' suscepto super se onere Umpiragii præd' ore tenus (Anglicè, by word of Mouth) arbitravit & ordinavit quod præd' Johannes solveret prædict' Burrowes septuagint' libras super decimum nonum diem Maii tunc prox' sequen' apud dom' Johannis Ellison in Sheffield in Com' Eborum int' duodecimam & tertiam horas post meridiem ejusdem diei Et quod post talem solutionem super eundem diem apud eundem locum præd' Burrowes & Johannes Eyre un' eorum alteri invicem sigillarent general' Relaxationes præd' tamen Johannes Eyre licet sepius requis. præd' septuagint' libras eidem Burrowes non solvit juxta formam & effectum Umpiragii præd' Et hoc parat' est verificare unde pet' Judicium & debitum & dampna sua sibi adjudicari, &c.

The Defendants
Special Demur-
rer.

Causas of De-
murrer.

Et præd' Johannes dic' quod prædict' Placitum præd' Burrowes superius replicando placitat' ac materia in eodem content' minus sufficien' in lege existunt ad prædict' Burrowes actionem suam prædict' versus eundem Johannem habend' manutenend' quodque ipse ad placitum ill' modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere & hoc parat' est verificare unde pro defectu sufficien' Replication' prædict' Burrowes in hac parte idem Johannes pet' Judicium Et quod præd' Burrowes ab actione sua præd' versus eum habend' præcludatur, &c. Et pro causis morationis in lege ipsius Johannis in hac parte idem Johannes juxta formam Statuti in hujusmodi Casu nuper edit' & provis' ostendit & Cur' hic demonstrat' has causas subsequen' videlicet quod non constat per Replication' ill' quod idem Johannes habuit notitiam quod arbitrator' præd' nominaver' præd' Cornelium Clarke fore Umpirator' inter partes præd' vel quod prædictus Cornelius habuit aliquam

aliquam authoritatē ad faciendū aliquod Umpirag' vel fore Umpirator' inter easdem partes de præmissis præd', &c.

Et prædictus Burrowes ex quo ipse sufficien' materiam in lege ad actionem suam præd' manutenend' superius replicando allegavit quam ipse parat est verificare Quam quidem materiam prædict' Johannes non dedit nec ad eam aliquatit' respond' set verification' ill' admittere omnino recusat idem Burrowes pet' Judic' & debitum suum præd' una cum dampnis suis occasione detentionis debiti illius sibi adjudicari, &c. Et quia Justic' hic se advisare volunt de & super præmissis prædictis priusquam Judic' inde reddant dies dat' est partibus præd' hucusque à die sancti Michaelis in tres Septiman' de audiendo inde Judic' suo eo quod Justic' hic inde nondum, &c.

Joynder in
Demurrer.

Trippet versus Eyres.

Trin. 4 Jac. Secundi Rot.

IN Debt upon an Obligation of 300 l. penalty.
The Defendant demanded Oyer of the condition, which was thus viz. If the above bounden John Eyre his Heirs, Executors and Administrators, for his and their parts and behoofs do in all things well and truly stand to and keep the Award of Francis Barlow, and Robert Soresby, &c. Arbitrators indifferently named and elected, as well on the part and behalf of the above-bounden John Eyre, as of the above-named Burrows Trippet to arbitrate and award of and concerning all Actions and Demands whatsoever at any time heretofore had, made, or depending between the said Parties or either of them, so as the said Award be made and put in Writing, or by word of Mouth, on or before the 9th day of April next ensuing; but if the said Arbitrators do not make such their Award by the time aforesaid, that then if the said John Eyre his Heirs, &c. do stand to and keep the Award and Umpirage of such Umpire, as the said Francis Barlow and Robert Soresby shall nominate between the said Parties of and concerning the Premises, so as the said Umpire do make his Award or Umpirage of and concerning the Premises by Writing or word of Mouth, on or before 16th day of April aforesaid, then this Obligation to be void.

The Defendant pleaded Actio non quia dicit, that the said Francis Barlow and Robert Soresby made no Award within the time aforesaid; and the said Defendant ulterius dicit, that the said Francis Barlow and Robert Soresby the 10th day of April in the year aforesaid, at London, in the Parish and Ward aforesaid, did name one Francis Jessup Esq; to be Umpire between the aforesaid Burrows Trippet, and the aforesaid John Eyre, and the said Francis Jessup

Jessup sic ut præfertur Umpirator nominatus, did within the time to him limited make no Award of Umpirage of and concerning the Premises, & hoc paratus est verificare unde petit Judicium, &c.

The Plaintiff replies, quod bene & verum est, that the said Arbitrators made no Award, and that before the 16th day of April aforesaid, Scilicet, at the day and place in the Plea of the Defendant mentioned, they did name the said Francis Jessup to be Umpire between the said Parties; but he further saith, that the said Francis Jessup adunc & ibidem fore Umpiratorem penitus recusavit, & superinde, the said Arbitrators postea adunc & ibidem nominaverunt quendam Cornelium Clarke Armig' to be Umpire between the said Parties; and further saith, that the said Cornelius Clarke postea & ante prædict' decimum sextum diem Aprilis, scilicet, apud London, &c. suscepto super se onere Umpiragii prædict' ore tenus arbitravit & ordinavit quod prædict' Johannes Eyre solveret prædict' Burrows Trippett septuaginta libras, &c. And that after payment the Parties should give mutual Releases, and saith that the Defendant did not pay the said 70 l. according to the said award, & hoc paratus est verificare, &c.

To this Replication the Defendant demurred. This Case was the last Term argued at the Bar, and the Court took time till this Term to give their Opinions.

The sole Question was, whether the award made by Clarke was good, in regard the Arbitrators had before named Jessup to be Umpire, and tho' he refused, it was insisted on for the Defendant that the Arbitrators were concluded to name another, and so Cornelius Clarke had no Authority as Umpire.

Powell, Rokeby and Ventris were of Opinion for the Plaintiff.

Pollexfen, Chief Justice, for the Defendant.

The reasons the three Justices went upon were, that the Nomination of Jessup to be Umpire did not make him Umpire, and that his refusal immediately upon his nomination made it amount to no more than a bare proposal to him, and so to stand for nothing, and then it did not conclude the Arbitrators, but that they might name another: The purview of the Condition of the Bond is to be observed, the words being, to stand to the Award of such Umpire as the Arbitrators should nominate, and not of such Person as they should name to be Umpire. So that there is in the Condition a description or qualification of the Person to whose award the Parties should submit, viz. to such an one as should be Umpire, and Umpire by the nomination of the Arbitrators. Now Jessup, tho' nominated, yet was not Umpire, for his refusal hindered that, and therefore doth not come within the qualification; the Pleading is always suscepto super se onere Arbitrii, so

so that 'tis the acceptance that makes him Umpire of Arbitrators,

But it is objected, that the Arbitrators here have executed their Authority, and is done as fully as can be on their parts, and therefore they have no power to name any other; the Condition empowered them to name one, but not to name a second.

Ans^r. 'Tis true, when an Authority is once fully executed, the Power is determined; but here, admitting it to be an Authority, (which Ventris said it was not properly to be called so, there being no express Authority given to the Arbitrators, but 'tis rather a description or qualification of the Person which is to make the Award ut supra) yet there is no compleat execution. If a Letter of Attorney be to deliver Seisin, and the Attorney deliver Seisin within the view, which is no good Execution of his Authority; yet sure that does not hinder him from delivering Seisin upon the Land; an habere fac' prodes was executed by the Sheriff in delivering a House, and after it was over, it was discovered that a Person was hid in a Room of the House, whereupon he was turned out, and the Sheriff delivered Execution again, which was resolved to be well in Palmers Rep. 289. Submissions to Awards have been favourably construed, because they tend to the end of Controversies; it was surely the Parties meaning, if the Arbitrators named a man that rejected the Umpirage, that this should not conclude them from naming another: This nomination can be taken to be no more than a proposal of the thing to Jessup, who must be taken to be present at the first nomination for the pleading is, quod ad tunc & ibid' penitus recusavit.

But the great Objection relied upon at the Bar, and by the Chief Justice was, that Jessup, tho' he did refuse, might have still proceeded with the Umpirage; and then if Clarke were well nominated, there should be a concurrent Authority in several Persons to make an Award, which the Law will not suffer, as the Case of Bernard and King, Rol. Abr. 262. and Sty. 306. where the submission was to the Award of A. and B. so so that they made the Award within such a time; and if they made no Award, then to the Award of Umpirage of C. so as he made his Award within the same time; and the Pleading was, that the Arbitrators denegassent facere Arbitrium within the time, & superinde C. made an Award within the time, and it was adjudged that the Award was void, because the Arbitrators, notwithstanding the denial, might have made an Award, and the Umpire could have no power till their power was determined. And the Case of Barber and Giles, 1 Ro. Abr. 262 is to the same purpose.

To which it was answered, That if it be admitted that Jessup, after his refusal, might have taken upon him the Umpirage in case the Arbitrators had named no other Umpire, yet 'tis clear Jessup could not have accepted the Umpirage after another was named; for the Arbitrators naming another upon his refusal, had quite taken away their first nomination; and in case Jessup had accepted before they had proceeded to name another, then the Arbitrators had been prevented naming of any other; so here could be no concurrent Power at all, Vide the Case of Frall and Brierly, 2 Ro. Abr. 261. Where the submission was to two Arbitrators, and if they did not agree within a certain time, then to the Umpirage of such an one as they should choose, so that the Umpire made his Award within the same time: And it was shewn that the Arbitrators made no Award, and they chose an Umpire who made an Award within the time; and that was held good, because they had determined their Power by choosing an Umpire, and so it differed from the Case of Bernard and King, where the Umpire was named in the submission; and the Case of Copping and Horner, 2 Saunders 129. where the submission was to Arbitrators, and if they made no Award, and could not agree in such a time, then to the Arbitrament of J. S. so that he made an Award within the same time.

In an Action brought upon the Award made by the Umpire, it was set forth, that the Arbitrators made no Award, nec facere potuerunt aliquod Arbitrium inter Partes, and that the Umpire made an Award within the time; upon a Demurrer to the Declaration, Judgment was given for the Defendant; for the Averment quod non potuerunt facere Arbitrium was idle, for it appeared they might have made an Award within the time: But as 'tis reported by Saunders, if the Plaintiff had set forth that they had declared they would make no Award. Then all the Court held (except Twysden Justice) that the Award of the Umpire had been good.

And this Ventris said did somewhat shake the Authority of Bernard and Kings Case.

But Pollexfen, Chief Justice, said he had taken a report of the Case of Copping and Horner, and produced his Report, where there was no mention of that last Opinion reported by Saunders.

And the Chief Justice said, no Case could be put that where a man that was vested with a bare Authority, his denial or refusal to execute it could conclude him, but that notwithstanding he might execute his Authority; but if he makes a void or insufficient execution he may do it over again. There is no reason he said to take the words adtunc & ibidem penitus recusavit, that he was present, and that the nomination was but a communication or proposal, for if he had notice of it many days after, and refused, the

the pleading might be the same, and no Traverse could be taken to the adunc & ibidem. Where a man is to be vested with an Interest his Acceptance is necessary; but it signifies nothing when but a bare Authority. In the Cases of Awards the Pleading is, nullum fecerunt arbitrium, and 'tis never pleaded that they were not Arbitrators, or that they refused to be Arbitrators; for the Submission makes them so, the pleading suscepto super se onere arbitrii is but meer form. Lessee for years assigns upon Condition to obtain the assent of the Lessor; the Lessor at first denies, he may after Consent, and 'tis a good performance of the Condition, 14 H. 7. 17. This is properly an Authority in the Arbitrators; 'tis so taken in Vinyor's Case in 8 Co. and is revokable as other Authorities are.

These were the Chief Reasons upon which the Chief Justice relped.

But Judgment was given for the Plaintiff by the Opinion of the other three Justices.

Anonymus.

In a Writ of Dower the Tenant was Essoigned, and the Essoign adjourned in Crastino Purificat', at which Day the Demandant did not appear with the Writ, and demand the Tenant, but would have a Grand Cape made out.

This being shewn to the Court, they said the Demandant must be default, for his not being ready in Court at the Day of Adjournment of the Essoign to demand the Tenant, and the Tenant was therefore in no default.

Dowse versus Cale.

SHOD. A. JOHANNES CALE nuper de London' Plumber, Executor Test'i Richardi Cale nuper dict' Richardi Cale of the Parish of St. Bidogets alias Bides, London Plumber sum' suit ad respondend' Thomæ Dowse gen' assign' Thomæ Dowse patri suo assign' Arthuro Stanhope Armig' Edwardo Rosceter Mil' Johanni Wostenholme Armig' & Thomæ Bristowe gen' assign' Johannis Comit' de Clare de placito quod teneat ei convention' inter ipm Johann' Comit' de Clare & præfat' Ric' Cale in vita sua fact' secundum vim formam & effectum quarundam Indentur' inter eos confectarum, &c. Et unde idem Thomas Dowse per Robert' VVaring Attorn' suum die quod cum prædict' Johannes Comes de Clare nono die Decembris Anno Domini Millesimo sexcentesimo quadragesimo septimo seisis' fuisset de & in tribus Messuagiis cum pertin' in parochia sancti Clementis Decorum in

Covenant by an Assignee of an Assignee of an Assignee against an Executor.

Lessor seized in Fee.

Com'

And demised
by Indenture.

For 41 years.

Reddend, &c.

The Covenant's.

Com' Midd' præd' in dominico suo ut de feodo Ipsoque Johanne Comite de Clare sic inde seisit' existen' Idem Johannes Comes de Clare postea scilicet eodem nono die Decembris Anno Domini Mille. simo sexcentesimo quadagesimo septimo supradicto apud paroch' sancti Clement' Dacorum præd. in Com. præd. per quandam Indentur. inter ipsū Johannem Comit' de Clare per nomen Præhonorabil' Johannis Comit' de Clare ex una parte Et præfat' Ricm' Cale in vita sua per nomen Ricardi Cale de paroch' sanctæ Bridgettæ aliis Wydes London' Plumber ex altera parte adtunc & ibidem fact. cujus alteram partem sigillo ipsi Ricardi in vita sua sigillat' idem Thomas Dowse modo quer' hic in Cur' profert cujus dat' est eisdem die & anno dimississet præfat' Ricardo testia præd' cum pertin' per nomina tot' illorum trium Messuagiorum sive tenementorum suorum cum pertin' in paroch' sancti Clement' Dacorum in Com' Midd' adtunc vel nuper in tenura & occupation' Elianoræ Peirson Vid' Assign' assignat' vel subtenen' (Anglicè ~~Undertenants~~) suorum prox' jacen' messuag' sive tenement' Willielmi Haberfield erga orien' & continen' in longitudine ex ea parte Centum & sexagint' pedes Assize (Anglicè of Assize) aut eo circit' & prox' messuagio sive tenement' adtunc in tenura Willielmi Hobson cogn' per nomen de le Beare & Harrow erga occiden' & continen' in longitudine ex ea parte Centum & sexagint' pedes Assize (Anglicè of Assize) aut eo circit' & in latitudine erga Austr' super plateam adversus quendam locum vocat' le Butcher Rowe quatuordecim pedes Assize (Anglicè of Assize) & ad finem erga Boream novemdecim pedes Assize (Anglicè of Assize) aut eo circit' habend' & tenend' dict' tria messuag' sive tenementa & præmissa cum pertin' dicto Ricardo Cale Executor' Administrator' & Assign' suis à Festo Natalis Domini nostri Dei prox' sequen' dat' ejusdem Indentur' pro & duran' toto tēpore & tēpore quadragint' & unius annor' extunc p' sequen' plenar' complend' & finiend' Reddend & solvend' p'inde annuatim & quolibet anno duran' toto dict' termino dicto Comiti Hæred' vel Assign' suis summam viginti libr' legalis Monetæ Angl' ad vel in magna Aula capitalis messuagii sive domus manconal' dicti Comit' situat' in Dury Lane in Paroch' Sancti Clement' Dacorum præd' ad quatuor maxime usual' terminos & Festa in anno (videlicet) Annunciation' beatæ Dom' nostræ Sanctæ Mariæ Virginis Nativitat' Sancti Johannis Baptistæ Sancti Michaelis Archi & Natal' Domini nostri Dei p' equas & equal' portion' vel infra octodecim dies p' post unum Quodque eorundem Festorum prima solution' inde incipiend' & fiend' ad & sup' Festum Nativitat' Sancti Johannis Baptistæ p' sequen' dat' ejusdem Indentur' vel infra octodecim dies p' post dict' Festum Et præd' Rich' Cale p' seipso Executor' Administrator' & Assign' suis & quilibet eorum convenit p'misit & concessit ad & cum dicto Comite de Clare Hæred' & Assign' suis p' Indentur' præd' Qd' ipse præd' Rich' Cale Executor' Administrator' vel Assign' sui indilate post dat' ejusdem

eiusdem Indentur' devalerent & psternerent (Anglicè pull oꝝ take down) tot' dict' tres domos tunc stan' & existen' sup dicta dimiss' pmiss' & erigerent edificarent & extruerent (Anglicè, set up) sup dict' solum ad ejus vel eorum ppr' onera & custag' tres tam valid' firmas substantial' & artificiosas (Anglicè, Workmanlike) domos tam in operibus Laterar' Carpentar' Dealvator' (Anglicè, Plasterers) Plumbar' Fabr' Vitrar' Lapidar' (Anglicè Mason) & Pictor' (Anglicè, Painter) quam ipse præd' Rich. Cale tunc nup' edificaverat p seipso in Fleetstreet in præd' Paroch' Sanctæ Bridgette alias Wydes Lond' in un' quarum quidam Domorum ipse tunc habitabat Ac etiam de tempore in tempus & ad omnia tempora tunc postea duran' dicto termino annorum p eandem Indentur' concess' ad ejus vel eorum ppr' onera & custag' bene & sufficien' repararent fulcirent sustinerent conservarent & manutenerent omnia domos & edificia agreeat' & convent' edificat' fore sup dicta dimiss' pmiss' aut aliquam partem inde Ac etiam omnia & singula Canal' (Angl' Sewers) Sentinas (Anglicè, Dunks) Elicia (Anglicè, Dains) & Paviment' (Anglicè, Pavements) fact' vel fiend' in p & cum omnibus requisit' & necessar' reparation' Ac dicta dimiss' pmiss' ac domus & edificia supinde fore erect' & edificat' & eorum quodlibet bene & sufficien' reparat' supportat' sustent' conservat' & manutent' in sine vel citiori determination' dicti termini quadragint' & un' annorum pacifice & quiete relinquerent traderent & sursum redderent dict' Comiti Hered' vel Assign' suis put per p eandem Indentur' plenius apparet Virtute cujus quidem dimission' prædict' Ricus Cale in tenementa præd' cum p'tin', &c. ut sic p'sertur dimiss' intravit & fuit inde possessionat' reversion' inde eidem Johanni Comiti de Clare & Hered' suis spectan' Ipsoque Rich. Cale sic de tenementis prædict' cum p'tin' possessionat' existen' ac præd' Johanne Comite de Clare de Reversione inde in dominio suo ut de feodo seisir' existen' idem Johannes Comes de Clare postea scilicet sexto die Augusti Anno Regni Domini Caroli secundi nup' Regis Angl', &c. decimo quarto apud Paroch' Sancti Clement' Dacorum præd' in Com' præd' p quendam Indentur' int' eundem Johannem Comit' de Clare per nomen præhonorabil' Johannis Comit' de Clare ex una parte Et præd' Arthurum Stanhope Edward' Rosseter Joh' Wolstenholme & Tho' Bristowe per nomina honorabil' Arthur' Stanhope Armig' secundi Filii nuper præhonorabil' Philippi Comit' de Chesterfeild Ed. Rosseter de Somerby in Com' Lincoln. Mil' Joh. Wolstenholme de London' Armig' & Tho. Bristowe de Beesthorpe in Com' Nottingham Gen. ex altera parte adtunc & ibidem facta cujus quidem Indentur' un' partem sigillo præd' Comit' de Clare sigillat' idem Tho. Dowse modo Quer' hic in Cur' p'sert' cujus dat' est eisdem die & anno ult' supradicto pro & in consideration' cujusdam Pecunie summe eidem Comit' de Clare in manibus præd' Arthur' Stanhope Ed. Rosseter Joh' Wolstenholme & Tho. Bristowe solut' bargainavit & vandidit præfat' Arthuro Stanhope

To pull down
some Houses.

And build up
new Houses in
their rooms.

The Lessee en-
tered and was
possessed.

Lessor bargains
and sells the
Reversion for a
year.

By virtue
whereof, and of
the Statute of
Uses the Bar-
gainee was pos-
sessed.

The Lessor Re-
leases the Inhe-
ritance.

To the use of
himself for life.

And after his
decease to the
Grantees for
1000 years.

hope Ed. Rossiter Joh. Wolstenholme & Tho. Bristowe (int' al')
reversion' tenementorum præd' cum pertin præfat' Rich. Cale, &c.
ut præfertur dimiss' habend' & tenend' reversion' ill' eisdem Arthur
Stanhope Ed. Rossiter Joh. Wolstenholme & Tho. Bristowe Executor
Administrator' & Assign' suis a die prox' ante dat' ejusdem Indentur'
pro & duran' termino un' anni integri extunc prox' sequen' plenar'
complend' & finiend' reddend' & solvend' proinde dicto Joh. Comiti de
Clare Hæred' & Assign' suis reddit' un' grani Piperis ad Festum Sancti
Michaelis Arch' prox' sequen' post dat' ejusdem Indentur' si idem
foret petit' Virtute quarum quidem bargainæ & vendition' necnon
vigore cujusdam Actus in Parliament' dom' Henrici huper Regis Angl'
octavi apud Westm' in dicto Com' Midd' quarto die Februar' Anno
Regni sui vicesimo septimo tent' edit' & provis' de usibus in possessi-
on' transferend' præd' Arthur' Stanhope Ed. Rossiter Joh. Wolsten-
holme & Tho. Bristowe fuer' de præd' reversion' tenementorum
præd' cum pertin' possessionat' reversion' inde ulterius eidem Comit'
& Hæred. suis spectan. Ipsisque Arthur. Stanhope Ed. Rossiter Joh.
Wolstenholme & Tho. Bristowe sic de præd' reversion. tenementorum
præd' cum pertin. possessionat. existen. ac præd' Comite de reverti-
on. inde immediate super præd' termin. præd' Arthur. Ed. Joh. Wol-
stenholme & Tho. Bristowe expectan. in dominico suo ut de feodo
scisit. existen. idem Comes postea scilicet septimo die Augusti Anno
Regni dict' nuper Regis Caroli Secundi decimo quarto supradicto
apud Paroch. Sancti Clement. Dacorum præd' in Com. præd' per
quandam al. Indentur. int. eundem Joh. Comit. de Clare per nomen
præhonorabilis Joh. Comit. de Clare ex una parte & præfat. Arthur.
Stanhope Ed. Rossiter Joh. Wolstenholme & Tho. Bristowe p nom'
præhonorabilis Arthur. Stanhope Armig. secundi Filii nuper præho-
noral. Philip. Comit. de Chesterfeild defunct. Ed. Rossiter de So-
merby in Com. Lincoln' Mil. Joh. Wolstenholme de London. Armig'
& Thomæ Bristowe de Beerthorpe in Com. Nottigham gen. ex altera
parte adtunc & ibidem fact. cujus un' partem sigillo prædict' Comit.
de Clare sigillat'. Idem Thomas Dowse modo quer' hic in Cur'
pferit cujus dat' est eisdem die & anno ult' supradict' pro & in conf.
in eadem Indentur' mentionat' relaxavit & remisit præfat' Arthur'
Stanhope Edwardo Rossiter Johanni Wolstenholme & Thomæ
Bristowe (inter al.) præd' reversion' ipsius Comit. tenementorum
præd' cum pertin. habend. & tenend. eisdem Arthur' Stanhope
Edwardo Rossiter Johanni Wolstenholme & Thomæ Bristowe
Hæred' & Assign. imperpetuum ad usum præd' Johannis Comit. de
Clare p termino vitæ suæ natural' Et post decess. ipsius Comit.
tunc ad usum quorundam Arthur. Stanhope Edwardi Rossiter
Johannis Wolstenholme & Thomæ Bristowe Executor' Administrator'
& Assign' suorum p & duran' termino Mille annorum a dat' ejus-
ejusdem Indentur' computand' plenar' complend. & finiend. virtute
cujus quidem relaxation' necnon vigore prædict' Statut' de usibus
in

in possession' transferend' Idem Johannes Comes de Clare fuit de præd' revercon' tenementorum præd' cum pertin' seisit' in dominico suo ut de libero tenemento p termino vitæ suæ natural' remanere inde ut præfertur limitat' spectan' Et sic inde seisit' existen' idem Comes postea scilicet primo die Julii Anno regni dicti nuper Regis Caroli Secundi decimo octavo apud præd' paroch' sancti Clement' Dacorum obiit sic de tali statu suo inde seisit' post cujus mortem iidem Arthur' Stanhope Edwardus Rossiter Johannes Wolstenholme & Thomas Bristowe possessionat' fuer' de præd' revercon' tenentorum præd' cum pertin' p præd' termino Mille annorum Et sic inde possessionat' existen' iidem Arthur' Stanhope Edwardus Rossiter Johannes Wolstenholme & Thomas Bristowe postea scilicet septimo die Julii anno regni dicti nuper Regis Caroli Secundi vicesimo apud præd' paroch' sancti Clement' Dacorum per quandam Indentur' inter Gilbertum Comit' de Clare & præfat' Arthur' Stanhope Edward' Rossiter Johannem Wolstenholme & Thomam Bristowe per nomina Præhonorabil. Gilberti Comit' de Clare Honorabil' Arthur. Stanhope Armig' secundi filii nuper Præhonorabil' Philippi Comit. de Chesterfield defunct. domini (Anglicè *Str*) Edwardi Rossiter de Somerby in Com' Lincoln' Mil' Johannis Wolstenholme de London Armig' & Thomæ Bristowe de Beerthorpe in Com. Nottr. gen' ex un' parte & quendam Thomam Dowse patrem præd' Thomæ Dowse modo quer' per nomen Thomæ Dowse de *Gray's Inn* in Com. Midd. gen. ex altera parte adtunc & ibidem fact' cujus quidem Indentur' un' partem sigillis præd' Gilberti Comitis de Clare Arthur' Stanhope Edwardi Rossiter Johannis Wolstenholme & Thomæ Bristowe sigillat' Idem Thomas Dowse modo quer' hic in Cur' pferet cujus dat' est eisdem die & anno ult' supradict' p & in cons' cujusdam pecuniæ summæ eisdem Arthur. Stanhope Edwardo Rossiter Johanni Wolstenholme & Thomæ Bristowe in manibus p præd' Thomam Dowse patrem solut' concessit' dicto Thomæ Dowse pfi Executor. Administrator. & Assign. suis (inter al') præd' revercon' tenementorum præd' cum pertin' habend. & tenend. revercon' præd. cum pertin' dicto Tho' Dowse pfi Exec. Administr. & Assign' suis p & duran' omni reliq' & resid' dicti termin' Mille annor' tunc ventur. & inexpirat' prout per eand' Indentur' plenius apparet ad quam quidem concessio' dictus Ricardus Cale postea scilicet octavo die Julii Anno regni dicti nuper Regis Caroli Secundi vicesimo supradicto apud præd. paroch. sancti Clementis Dacorum eodem Ricardo Cale tunc tenent. tenementorum præd. cum pertin. virtute dimission' præd. sibi ut præfertur fact. existen. se attorn' & agreavit virtute cujus quidem concessio. & attornament. præd. ptextu prædict. Thomas Dowse pater de præd. revercon' tenentorum prædict' cum pertin' fuit possessionat' pro resid' dicti term' Mille annorum Ipsoque Ricardo Cale sic de tenementis prædict' cum pertin' ut pferetur possessionat' existen' Idem Ricardus Cale in vita sua scilicet octavo die Julii Anno regni dicti nuper Regis

Seisin by virtue
of the Statute
of Utes.

Tenant for Life
died seised.

The Grantor
possessed for the
Term of 1000
years.

And by Inden-
ture grant to
the Defendant
Testator for
the residue of
the Term.

The Tenant
for years
attorns.

The Tenant in
possession
makes his Will,
and makes the
Defendants
Father his
Executor.

And died
possessed.
The Defendant
proved the
Will and
entred, and
was possessed.

Then the
Grantee in
Reversion
made his Will,
and devised the
Reversion to
the Plaintiff
for Life, and
after his
decease to his
Son in Tail.

And made
the Plaintiff
Executor.
And died.

The Plaintiff
proved the
Will.

And claimed
the Tenements
Virtute legat.

Protestando,
That the
Defendant did
not perform
the Covenants
of his part.

Caroli Secundi decimo nono apud prædict' paroch' sancti Clementis
Dacorum condidit test' & ult' volunt' sua in scriptis & inde constituit
prædict' Johannem Cale Executor' & prædict' Ricin Cale postea &
post attornament' prædict' fact' scilicet decimo die Decembris anno
regni dicti nuper Regis Caroli secundi vicefimo secundo apud præd'
paroch' sancti Clementis Dacorum obiit de tenementis præd' sibi ut
pferetur dimiss' sic ut præfertur possessionat' post cujus mortem præd'
Johannes Cale onus execution' test' prædict' super se suscepit &
ut Executor test' prædict' in tenementa prædict' cum pertin' intravit
& fuit inde possessionat' Et sic inde possessionat' existen' prædictoque;
Thoma Dowse patre de revercon' inde ut pferetur etiam possessionat'
existen' ipse prædict' Thomas Dowse pater postea scilicet vicefimo
sexto die Februarii anno regni dicti nuper Regis Caroli secundi
tricesimo sexto apud paroch' sancti Clement' Dacorum prædict' fecit
& condidit testm' & ult' voluntat' sua in scriptis & per eadem
test' & ult' voluntat' sua dedit & devisavit inter al' prædict' rever-
con' tenementorum prædict' cum pertin' eidem Thomæ Dowse
modo quer' filio suo pro termino vitæ ejusdem Thomæ filii & post
ejus decess' tunc cuidam Thomæ Dowse filio prædict' Thomæ Dowse
modo quer' & hæred' de corpore ejusdem Thomæ filii præd' Thomæ
modo quer' exeun' & de eodem testō idem Thomas Dowse pater
constituit dict' fil' suum Thomam Dowse modo quer' sol' Executor'
Posteaque scilicet decimo sexto die Aprilis anno tricesimo secundo
supradicto apud paroch' sancti Clement' Dacorum prædict' in Com'
præd' prædict' Thomas Dowse pater obiit de prædict' revercon'
tenementor' præd' cum pertin' in forma præd' possessionat' post
cujus mortem prædict' Thomas Dowse modo quer' scilicet vicefimo
sexto die Januarii anno regni dicti nuper Regis Caroli secundi trice-
simo tertio supradicto test' prædict' debita juris forma apud præd'
paroch' sancti Clementis Dacorum probavit ac onus & execuconem
test' prædict' super se suscepit & prædict' revercon' tenementorum
prædict' cum pertin' ratione legat' prædict' diet' vicefimo sexto die
Januarii anno tricesimo tertio supradicto apud prædict' paroch'
sancti Clement' Dacorum clamavit virtute cujus quidem legationis
idem Thomas Dowse modo quer' de revercon' tenementor' prædict'
cum pertin' pro resid' dicti termini Mille annorum fuit possessionat'
Et sic inde possessionat' existen' prædictoque Ricardo Cale de tene-
mentis prædict' cum pertin' in forma prædict' ut præfertur posses-
sionat' existen' licet Idem Thomas Dowse modo quer' bene &
fidelit' observavit perimplevit performavit & custodivit omnia &
singula convencon' concession' articul' & agreement' in Indentur'
dimission' superius primo recitat' spec' ex parte prædict' Johannis
Comit' de Clare hæred' & assign' suor' observand' performand'
perimplend' seu custodiend' secundum formam & effect' ejusdem
Indentur' protestandoque quod prædict' Johannes Cale non tenuit
observavit perimplevit performavit seu custodivit aliqua convencon'
concession'

concession' articulos & agreement' in eadem Indentur' spec' ex parte prædict. Ricardi Cale Executor. Administrator. & Assign. suorum observand. performand. perimplend. seu custodiend. secundum formam & effect. Indentur. dimission. prædict' in facto idem Thomas Dowse modo quer. dic. quod prædict. Johannes Cale sic ut præfertur possessionat. existen. post mortem dicti Thomæ Dowse patris & ante finem prædict. termini quadragint. & unius annorum per eandem Indentur' concess. scilicet decimo tertio die Septembris anno Domini Millesimo sexcentesimo octogesimo quarto apud paroch. sancti Clementis Dacorum prædict. in Com. præd. permisit un' domum ad valentiam ducentarum librarum super prædict' dimiss. præmiss. per prædict. Ric' Cale in vita sua post dimission' prædict' sibi ut præfertur fact. & duran. dimission. ill. erect. fore penitus prostrat. consumpt' & totalit. ruinat. in omnibus partibus inde pro defectu supportacon. inde Et præd' Johannes Cale sic ut præfertur possessionat. existen. ad finem præd' termini quadraginta & un' annorum qui finivit ad Festum Natalis Dom Anno Domini MDCLXXXVIII. præd' dom sic prostrat' consumpt' & total' ruinat' reliquit contra formam & effect. convencon. præd' in ea parte quodque præd' Johannes Cale sic ut præfertur possessionat' existen' post mortem patris sui præd' & duran. præd' termino quadraginta & unius annorum scilicet decimo die Maii anno regni dicti nuper Regis Caroli secundi vicesimo quarto & continue postea usque ad finem præd. termini quadraginta & unius annorum pmisit paviament. cujusdam areæ (Anglicè *Yard*) parcel. præmissor. ut præfertur dimiss. fore & esse fract. dirupt. & in decasu pro defectu reparacon' inde per quod aqua pluvial. & al. aqua in aream præd. venien. p defectu reparacon. paviament. præd. à præd. area in & super muros & aream querceam (Anglicè *an Oaken ffloor*) cujusdam cellarii parcel. præmissorum ut præfertur dimiss. descender. ita quod muri & area quercea ill. per aquam ill. putrid. devener. & corrupt' quodque præd' Johannes Cale præd' pavement' sic fract' dirupt' & in decasu & præd' muros & aream querceam sic putrid' & corrupt' p defectu reparacon' inde ad finem præd' termini quadragint' & un' annorum reliquit contra formam & effect' convencon' prædict' in ea parte Quodque prædict. Johannes Cale sic ut præfertur possessionat' existen' post mortem patris sui prædict' & duran' prædict' termino quadraginta & un' annorum scilicet primo die Octobris Anno Domini Millesimo sexcentesimo octogesimo octavo pmisit tegulas lateras (Anglicè *Lathes*) fenestras & muros cement' (Anglicè *Plaster Wallis*) videlicet decem mille tegulas decem mille latas ducent. pedes fenestr' & centum virgat' cement' quatuor al' domorum super dimiss. præmiss. per prædict. Ric. Cale in vita sua post dimiss. prædict' sibi ut præfertur fact' & duran' dimiss. ill. erect. fore & esse fract' dirupt' & in decasu p defectu reparacon' inde Et prædict. Johannes Cale prædict' tegulas latas fenestras ac muros sic fract' dirupt' & in decasu p defectu reparacon' inde ad finem prædict.

Breach assigned
in permitting
the Premises
to be out of
Repair.

The particulars

Another breach
assigned for
want of Repairs.

Another breach
for want of
Repairs.

Et sic, &c.

termini quadragint. & unius annorum reliquit contra formam & effect' convencon' prædict' in ea parte Et sic idem Thomas Dowse modo quer' dic' quod prædict' Johannes Cale convencon' præd' in Indentur' dimission' præd' superius prim. menconat' in hac parte fact' non tenuit sed infregit ac ill. eidem Thomæ Dowse modo quer' tenere contradixit & adhuc contradic' unde idem Thomas Dowse modo quer' dic' quod deteriorat' est & dampn' habet ad valenc' trecent. librarum Et inde pduc' sectam, &c. Et pfer' hic in Cur' idem Thomas Dowse modo quer' Litteras testament' præfat' Thomæ Dowse patris per quas satis liquet Cur' hic ipm Thomam modo quer' fore Execu- tor' testamenti ill. & inde habere administracon', &c.

The Defendant
pleads per-
formance specially
to each breach
assigned.

Et prædict' Johannes per Johannem White Attorn' suum ven' & defend. vim & injur' quando, &c. & dic. quod prædict' Thomas Dowse actionem suam præd. inde versus eum habere non debet quia dic. quod prædict' Ricardus Cale in vita sua post con- feccon' Indenturæ præd' superius prim. menconat' pstravit tot' præd' tres domus quæ dicto tempore confeccon' ejusdem Indentur' fuer' stant. & existen. super dimissa pmissa & de novo erexit ædificavit & extruxit super dict' solum in eisdem loc. ubi prædict. tres domus sic psternat. sic fuerunt stant. tres al. domus tantæ magnitudinis quant. prædict' tres domus sic prosternat' fuerunt quodque idem Johannes Cale à præd' tempore mort' præd' Ricardi Cale de tempore in tempus duran. toto prædict. termino quadraginta & unius annorum bene & sufficien. reparavit sustinuit conservavit & manutenuit omnes ill. tres domus sic de novo ædificat. cum pertin. & tres domus sic de novo ædificat. cum ptin. & tres domus ill. & quamlibet eorum sic bene & sufficien. reparat. sustent. conservat. & manutent. in fine prædict. termini quadragint. & unius annorum sursum reddidit & reliquit secundum formam convencon. prædict' in ea parte fact. Et de hoc pon. se super Patriam Et quoad non reparacon. paviamen. areæ præd. Idem Johannes dic. quod ipse idem Johannes non pmissit paviamen. areæ prædict' fore fract. dirupt. seu in decasu pro defectu reparacon. inde nec paviamen. & muros & aream queretam prædict. seu aliquam ptem inde fore fract. dirupt. seu in decasu pro defectu reparac' inde ad finem prædict. termini quadragint. & unius annorum modo & forma prout prædict' Thomas superius versus eum queritur Et de hoc ponit se super priam & præd' Thomas similiter Et quoad permission' tegular' laterar' fenestras & murorum test' in narratione præd' mentionat' fore & esse fract' dirupt' & in decasu pro defectu reparation' Idem Johannes dic' qd' ipse idem Johannes Cale non permisit tegulas lateras fenestras & muros cement. præd' seu aliquam partem inde fore fract' dirupt' seu in decasu pro defectu reparation' inde nec præd' tegul' lat' fenestras & muros cement' præd' seu aliquam partem inde fract' dirupt' seu in decasu pro defectu reparation' inde ad finem præd' termini quadragint' & unius annorum reliquit modo & forma prout præd' Thomas superius versus eum queritur

An Issue
tendered.

Another Issue
tendered.

queritur Et de hoc ponit se super priam & prædict' Thomas si-
militer, &c. A third issue
tended.

Et prædict' Thomas Dowse filius die' qd' præd' placitum præd'
Johannis Cale quoad fraction' convention' præd' in relinquendo ad
finem præd' termini quadragint' & unius annorum præd' un' domum
super præd' dimissa præmissa per præd' Rich. Cale in vita sua post
dimission' præd' sibi ut præfertur fact' & duran' dimission' ill' erect'
prostrat' consumpt' & totalit' ruinat' prout idem Thomas Dowse
filius superius inde narravit superius in barram placitat' materiaque
in eodem placito content' minus sufficiens in lege existunt ad ipsum
Thomam Dowse filium ab actione sua præd' inde versus præfat' Jo-
hannem Cale habend' præcludend' qd' q; ipse ad placitum illud in
hac parte modo & forma præd' placitat' necesse non habet nec per
legem terræ tenetur respondere Et hoc parat' est verificare unde pro
defectu sufficien' placiti in hac parte idem Thomas Dowse pet' judi-
cium & dampna sua occasione fraction' convention' præd' in hac parte
sibi adjudicari, &c.

Et præd' Johannes Cale die' qd' placitum præd' per ipsum Jo-
hannem modo & forma præd' placitat' materiaque in eadem content'
bon' & sufficien' in lege existit ad Cur' dict' Domini & Dominæ Re-
gis & Reginæ nunc hic a cognitione placiti prædict' habend' præ-
cludend' quod quidem placitum materiaque in eadem content'
idem Johannes parat' est verificare & probare prout præd' Cur',
&c. Et quia præd' Thomas Dowse ad placitum illud non re-
spond' nec ill' hucusque aliquant' deduc' idem Johannes Cale pet'
Judicium si Cur' dictorum Dom' & Dominæ Regis & Reginæ nunc
hic placitum illud ulterius cognoscere velit. A Joynder is
Demurrer. Den. Trinder.
Et quia Justic' hic se advisare volunt de & super præmissis unde
partes præd' superius posuer' se in Judicium Cur' priusquam Judi-
cium inde reddant dies dat' est partibus præd' hucusque in Octabis
Sancti Hilarii de audiendo inde judicio suo eo qd' iidem Justic' hic
inde nondum, &c. Et quoad triand' separal' exit' præd' inter par-
tes præd' per patriam triand' superius junct. Prec. est Vic. qd. venire
fac. hic ad præfat. Terminum duodecim, &c. per quos, &c. Et qui
nec, &c. ad recogn. &c. Quia tam, &c.

Dowse *versus* Cale.

IN an Action of Covenant brought by Thomas Dowse, as Assignee of Thomas Dowse his Father, Assignee of Arthur Stanhope, Edward Rossiter, John Wolstenholm and Thomas Bristow, Assignees of John late Earl of Clare, against John Cale Executor of Richard Cale. The Plaintiff set forth a Lease by Indenture, made by the said Earl of Clare the 9th of December 1647. to the said Richard Cale of three Messuages in the Parish of St. Clement Danes in Middlesex, to hold from Christmas Day then next following for 41 years, rendering 20 l yearly Rent; and further sets forth, that the said Richard Cale by the said Indenture Covenanted with the said Earl, his Heirs and Assigns to pull down the said three Houses, and would in the same place build three as good and substantial Houses in all respects as the said Richard Cale had for some short time before built for himself in Fleetstreet; Ac eciam, That he would, during the said term, well and sufficiently repair all the Houses so agreed to be built; ac eciam, omnia & singula Canal' (Anglicè, Sewers) Sentinas (Anglicè, Sinks) Elicia (Anglicè, Drains) & paviamenta fact' vel fiend' in pro & cum omnibus requisitis & necessar' reparationibus ac dicta dimissa præmissa ac domus & edificia superinde fore erect' & edificat' & eorum quodlibet bene & sufficienter reparat' supportat' & manutent' in fine vel citiori determinatione dicti termini pacifice & quiete relinquere & sursum redderet dicto Com' Hæred' & Assign' suis prout per Indentur' præd', &c.

By virtue of which said Demise the said Richard Cale entered and was possessed, and the said Earl being seised of the Reversion by Lease and Release, dated the 6th and 7th of August 1662. conveyed the said Reversion to the said Arthur Stanhop, Edward Rossiter, John Wolstenholm and Thomas Bristow and their Heirs, to the use of the said John, Earl of Clare, during his Life, and after his Decease to the use of the said Stanhop, Rossiter, Wolstenholm and Bristow for one thousand years next after the date of the said Indenture; and that after the said Earl of Clare died, and the said Stanhop, Rossiter, Wolstenholm and Bristow became possessed of the Reversion of the Premises for the said term of 1000 years; and upon the 7th of June 1668. by an Indenture between Gilbert, Earl of Clare, and the said Stanhop, Rossiter, Wolstenholm and Bristow of the one part, and Thomas Dowse (father of the Defendant) of the other part; they granted to the said Thomas Dowse the Reversion of the said Premises, for and during the residue of the term of 1000 years, to which the

the said Richard Cale being then possessed of the term demised to him as aforesaid of the Premises, did attain; and the said Richard Cale being so possessed in the year 1672. died, having made his last Will, and the Defendant Executor thereof, who after the decease of the said Richard, entered into the said demised Premises, and became possessed; and the said Thomas Dowle, father to the Plaintiff, died possessed of the Reversion aforesaid, in the year of our Lord 1686. having made his Will, and thereby devised the said Reversion to the Plaintiff for his life, and after his decease to Thomas Dowle, Son of the Plaintiff, and to the Heirs of his Body, and made the Plaintiff Executor of his said Will, who caused the same to be proved, and did claim the Reversion of the said Premises *ratione legationis præd'*, and thereupon became possessed thereof for the residue of the said term of 1000. years then to come, and unexpired: And the said Richard Cale being possessed by virtue of the Demise aforesaid, altho' he the said Thomas Dowle performed all the Covenants to be performed as aforesaid on the part of the said John, late Earl of Clare, his Heirs and Assigns; the said Defendant did not perform the Covenants which were to be performed on the part of the said Richard Cale his Executors and Administrators, and in fact did the said John Cale being possessed of the Premises, after the decease of the said Thomas Dowle, father of the Plaintiff, before the end of the said term of one and sixty years, viz. the 13th of September 1684. did permit one House of the value of 200 l. erected upon the Premises by the said Richard Cale, in his life time, to fall down, and to be wholly ruined; and the said John Cale at the end of the said term, which ended at Christmas Anno Dom. 1688. left the said House so prostrated and ruined, *contra formam conventionis præd'*.

And assigns another Breach, for that he permitted the Pavement of the Yard to be broken and in decay; and at the end of the term left it so in decay for want of repair; and that he suffered the Tiles, and one hundred yards of Walling of four Houses upon the Premises, erected by the said Richard Cale, in his life time, during the term, to be broken and in decay for want of Repairs, and so the said John Cale left them at the end of the said term; and so the said Defendants broke the Covenants *ad damnum* of the Plaintiff 300 l.

The Defendant pleaded, that the said Richard Cale, in his life time, did demolish the three Houses demised, and upon the ground whereon they stood, did erect three new Houses according to the agreement, which, during the term, were kept well repaired, and at the end of the term left in good repair, and so yielded up according to the Covenant aforesaid, & *de hoc ponit, &c.* And as to the

not repairing the Pavements, traverteth that also, and the like as to repairing of Cilles and Walls.

The Plaintiff as to the not repairing of one House, in the Declaration mentioned, and delivering it up well repaired, demurs to the Defendants Plea; which Demurrer came to be argued this Term, and the sole question was upon this Covenant, whether the Defendant, being obliged only to build three Houses, and having built one more, whether the Covenant did not bind him to repair and deliver up that House well repaired, as well as those which were agreed to be built: And the Court were of Opinion that the Covenant did extend to the other House as well as to the three which were agreed to be built: For in the last Covenant, which is to deliver up well repaired, 'tis dicta premissa, ac Domos & Edificia superinde fore erect, which is general; and 'tis the rather so to be taken, because in the first Covenant for keeping in repair during the term; 'tis the Houses agreed to be built, which words, agreed to be built, are left out in the last Covenant, which the Court took to be a distinct Covenant.

Rokeby doubted, it seeming to him to be all as one Covenant, and so all the subsequent matter concerning leaving the Houses well repaired, should be restrained and understood of those agreed to be built.

But Judgment was given for the Plaintiff upon the reasons aforesaid.

It was also objected on the part of the Defendant, that Dowle the Plaintiff was not an Assignee in this Case to buying Covenant, for that the term in the reversion was devised to him for Life only; and if he died within the Term, then to his first Son, &c.

To this it was answered, that the Devise of the term to him, passed the whole Estate, and the remainder to the Son was but a possibility, and an executory Devise.

Welbie *versus* Phillips.

IN Debt for Rent, the Plaintiff declared upon a Demise made the 25th of March Anno nuper Regis Jac. 4. of one Messuage to hold from thenceforth quamdiu ambabus partibus placeret, yielding 10 l. Rent quarterly, and avers that the Defendant entered by virtue of the said Demise, and continued possessed of the Premises till Christmas then next following, and for 50 s. a quarters Rent ending at the said Christmas Day, he brings his Action, and so lays two several other Demises of two other Houses, to begin at the same time, under the same Rent, and demands a quarters Rent upon each at Christmas aforesaid, in all 7 l. 10 s. which the Defendant did not pay, which he lays ad damnum 5 l.

The Defendant demurred to this Declaration, for that he sues for a quarters Rent upon each Demise, ending at Christmas, whereas there were two quarters incurred before, which he doth not shew were paid, and so sues for less, than upon his own shewing appeareth to be due; and the Case of Baily and Offord, 3 Cro. was cited, where upon a Demise, rendering 31 s. per annum at our Lady Day and Michaelmas, the Plaintiff declared for 15 s. and 6 d. due for a years rent, ending at our Lady Day, and held naught, because he demands but 15 s. and 6 d. and doth not shew that the rest of the years Rent was satisfied; and the Case of Clochworthy in 3 Cro. where in a Writ of annuity the Plaintiff demanded the Arrears, incurred at Michaelmas, 3 Car. 1. and brought his Writ the 16th of April 4 Car. 1. and said in that Case by Maynard, that a man cannot bring an Action for part of a Debt without he shews the rest satisfied, Vide 2 Cro. 499.

But the Court gave Judgement for the Plaintiff, and said this was not like the Cases cited; for in the first Case of Baily the whole years Rent is said to be due, and yet demands but half a year: And for the Case of Clochworthy, there the Judgement as appears by 3 Cro. and Ro. Abr. 1 part 229. was, that he should recover the Arrears before the Writ, and pending the Writ, whereas he demanded the Arrears but to Michaelmas before the Writ brought, and so the Judgement was for more than was demanded; but in this Case every quarters Rent is a several Debt, and distinct Actions may be brought for each quarters Rent; and so not like Debt brought for part of the Honey upon a Bond or Contract, Vide for this 7 H. 6. 26. a. Allen 57. Noy's Rep. 45.

Chafe versus Sir James Etheridge.

The Plaintiff in an Action for Words, had taken out an Original and delivered a Declaration, which the Defendant upon searching for the Instructions given by the Plaintiff to the Curſitor found differed in divers material things from the Original, and thereupon the Defendant pleaded the Statute of Limitations, that the words were not spoken within two years. The Plaintiff suspecting some miscarriage had been, upon which the Defendant, as he conceived, did rely, (for the Plaintiff knew the fact would not serve the Defendant to plead the Statute) he found that he had mistaken his Original, and upon that petitions the Master of the Rolls for another Original that should warrant the Declaration delivered, and had it granted and filed in Court; whereupon the Defendant moved the Commissioners of the Great Seal, and shewed the whole matter; upon which they set aside the Order of the Master of the Rolls, and ordered an Original to be taken out according to the first Instructions given to the Curſitor: And now the Court was moved here, that the last Original might be filed, and so it was ordered by the Court; for that taken out by the Order of the Master of the Rolls, was unduly taken out.

Whitaker versus Thoroughgood.

Benjaminus Thoroughgood Mil. attach. fuit per breve Domini Regis & Dominae Reginae de privilegio à Cur. hic emanen. ad respond. Edwardo Whitaker Gen. un. Attorn. Cur. Domini & Dominae Regis & Reginae de Banco juxta libertat. & privileg. ejusdem Cur. pro hujusmodi Attorn. & aliis Ministris de eodem Banco a tempore quo non extat memoria usitat. & approbat. in eadem Cur. de placito transgressionis super casum, &c. and so declares in propria persona in an Action, for that the Defendant being a Justice of Peace in the time of the late King James, made a Warrant, directed to the Constable, charging the Plaintiff with being outlawed of High Treason, ubi re vera, &c. The Defendant demurred, and shewed for Cause, that in the prescription for the Privilege, it was tempore quo non extat memoria, which was said to be insensible; and the course in pleading was to say a tempore cujus contrarium memoria hominum non existit. Sed non allocatur, for the Court took the words to be sufficiently expressing time out of mind, and divers Presidents are in this manner, Rastalls Entries 475, 476, and 143.

Shipley

Shipley versus Craister.

IN an Action of Debt upon a Bond of 80 l. the Plaintiff declared, that the Defendant entered into a Bond to him, who was then the Sheriff of Northumberland by the name of his Office of 80 l.

The Defendant demanded Oyer of the Condition, which was, that one Jenkin Wood should appear coram Dom. Rege apud Westm. die Lunæ proxime post Octab. Pur. &c. and then he pleaded a Release of all Demands under the Plaintiffs Hand and Seal, made to him, bearing date the 9th day of March in the third year of the reign of the late King James, & profert hic in Cur. the Release. And to this the Plaintiff demurred.

Serjeant Jefferson offered to argue, that this Bond being taken by the Sheriff, according to the duty of his Office, and for the benefit of the Plaintiff who brought the Action, that his Release to the Obligor would not bar this Action; but the Court said there was no colour but it should be a good bar.

But upon perusing of the Record it appeared, that the Defendant had pleaded that the Plaintiff had released by his Deed of Release, bearing date the 9th day of March, whereas the Release produced in Court, bore date the 19th of the same March; and this the Court held a material variance.

Note. The King cannot discharge a Recognizance taken for Security of the Peace, but after tis broken he may, 11 H. 7. 12.

Holland versus Lancaster.

JOHANNES LANCASTER sum fuit ad respondend' Thomæ Holland de placito quare cepit averia ipsius Thomæ & ea injuste detinuit contra Vad' & Pleg' &c. Et unde idem Thomas p Robertum Bird Attorn' suum queritur qd' præd' Johannes vicesimo secundo die Octobris Anno Regni Domini Jacobi secundi nup' Regis Angl', &c. tercio apud Mounckton in Insula de Thanett in quodam loco ibidem vocat' le Barnward cepit averia videlicet octo Vaccas ipsius Thomæ & ea injuste detinuit contra vad' & pleg' quousq; &c. Unde dic' qd' deteriorat' est & dampnum habet ad valenc' decem librarum Et inde pducit sectam, &c.

Et præd' Johannes Lancaster per Brian' Courthop Attorn' suum ven' & defend' vim & injur' quando, &c. Et ut Ballivus Decani & Capitalis Ecclesie Cathedral' & Metropolitan' Cantuar' bene cognoscit captionem averiorum prædictorum in prædict' Clauso in quo, &c. & juste, &c. Quia dic' qd' diu ante prædict' tempus captionis averiorum præd' ac eodem tempore quo, &c. præd' Decanus & Capital' fuer' seisis' de Manerio de Mounckton cum pertinen' in Com' in jure Eccle-

Count in Replevin.

Consuante as Bailiff to the Dean and Chapter of Canterbury, for a Distress for a Fine upon an Alienation. Dean and Chapter seised of a Mannor in Fee in jure Eccle-

*J. S. seized in
Fee of the locus
in quo.*

Kanc' præd' in dominico suo ut de feodo in jure Ecclesiæ suæ prædict' Qd'que quidam Johannes Sabine Barronettus diu ante præd' tempus quo, &c. fuit seisit' de tribus Mesuagiis quatuor Horreis centum & quadraginta Acris terræ & octogint' acris marisci cum pertin' in Parochiis de Mounckton & sancti Nicholai Atwade in Insula Thanett in Com' Kanc' præd' unde præd' Clausum in quo, &c. est & præd' tempore quo, &c. necnon a tempore cujus contrar' memoria hom' non existit fuit parcel' in dominico suo ut de feodo & illa tenuit de eisdem Decano & Capitulo ut de Manerio suo præd' per fidelitat' & reddit' sex librar' duorum solidorum sex denar' & un' oboli singulis annis ad Festum Sancti Michaelis Archi solvend' & per servicium faciend' sectæ ad Cur' ipsorum Decani & Capituli Manerii sui prædict' de tribus septimanis in tres septimanas apud Manerium ill' tenend' de quibus quidem serviciis iidem Decanus & Capitulus fuer' seisit' per manus præfat' Johannis Sabine ut per manus veri tementis sui videlicet de fidelitate & secta Cur' prædict' ut de feodo & jure ac de reddit' præd' in dominico suo ut de feodo Et prædict' Johannes Lancaster ulterius dic' qd' infra Manerium præd' talis habetur consuetudo & a tempore quo non extat memoria hom' habebatur scilicet qd' post quamlibet alienationem in feodo vel de statu liberi tenementi alicujus parcel' terræ vel testorum tent' de Manerio præd' Dom' Manerii præd' pro tempore existen' cum talis alienatio acciderit habuit & habere consuevit reddit' un' anni & medietat' reddit' unius anni per quem tal' terræ vel tenementa sic alienat' tent' fuer' de Manerio prædict' nomine finis pro alienatione Et sic dictus finis pro alienatione sic ut præfertur per consuetudinem Manerii prædict' solubil' aut aliqua pars in aretro fuit & insolut' qd' tunc Dom' Manerii prædict' pro tempore existen' de tempore in tempus & ad omnia tempora duran' toto tempore præd' quando & quoties necesse requisivit distrinxit & usus fuit & consuevit distringere in & super terras & tenementa præd' de Dom' Manerii præd' ut de eodem Manerio tent' & sic ut præfertur alienat' quousque dictus finis pro alienatione sic ut præfertur solubil' solut' foret Et prædict' Johannes Lancaster ulterius dic' qd' prædict' Decano & Capitulo de Manerio prædict' cum pertin' ac præd' Johanne Sabine de Mesuagiis Horreis & Terris præd' cum pertin' Unde, &c. in forma prædict' seisit' existen' Idem Johannes Sabine ante præd' tempus quo, &c. scilicet vicesimo die Septembris Anno Regni Domini Caroli Secundi

*And held it of
the Dean and
Chapter.
By fealty and
Rent, and Suit
of Court.*

*The Dean and
Chapter seized
of the Services.*

*A Custom for
the Lord to
have a year
and halfs Rent
upon every
Alienation.*

*And power to
distrain for it
(if in arrear.)*

*Quousque it be
paid.*

The Alienation.

*The Purchaser
entered, and was
seized.*

nuper Regis Angliæ, &c. tricesimo quarto apud Paroch' de Mounckton præd' alienavit præd' tria Mesuagia quatuor Horrea centum & quadraginta acr' Terræ & octoginta acras Marisci cum pertin' unde, &c. cuidam Waltero Tyndall Armig' habend' eidem Waltero Hæred' & Assign' suis imperpetuum Virtute cujus idem Walterus in Mesuagia Horrea & Terras præd' cum pertin' unde, &c. intravit & fuit inde seisit' in dominico suo ut de feodo Et sic inde seisit' existen' Ac eisdem Decano & Capitulo de Manerio prædict' cum pertin' in forma præd'

præd' feisit' existen' Idem Walterus ante præd' tempus quo, &c. scilicet decimo die Septembris Anno Regni dicti Domini Caroli Secundi nuper Regis Angliæ, &c. tricesimo sexto apud Paroch' de Mounckton præd' alienavit præd' tria Mesuagia quatuor Horrea centum & quadraginta acras Terræ & octoginta acras Marisci cum pertin' unde, &c. Cuidam Christophero Yates Gen' habend' eidem Christophero Hæred' & Assign' suis imperpetuum Et præd' Johannes Lancaster ulterius die' qd' per præd' consuetudinem Manerii præd' debet' fuer' eisdem Decano & Capitulo pro fine pro præd' prima alienatio præfat' Waltero Tyndall sic ut præfertur fact' summa novem librarum trium solidorum novem denar' un' oboli & un' quadrantis Ac pro fine præd' p secunda alienatione eidem Christophero ut præfertur fact' confimilis summa novem librarum trium solidorum novem denar' un' oboli & un' quadrantis & quia præd' separal' denar' summa in toto se attingen' ad octodecim libras septem solid' septem denar' & un' obol' præfat' Decano & Capitulo præd' tempore quo, &c. aretro fuer' & adhuc existunt insolut' Idem Johannes Lancaster ut Ballivus eorundem Decani & Capituli captionem averiorum prædict' videlicet captionem quatuor Vaccarum de præd' octo Vaccis pro præd' novem libris tribus solid' novem denar' uno obolo & uno quadrante pro fine pro præd' prima alienatione præfat' Waltero Tyndall sic ut præfertur fact' debet' & insolut' & captionem præd' aliarum quatuor Vaccar' de præd' octo Vaccis pro prædict' novem libris tribus solid' novem denar' uno obolo & un' quadrante pro fine pro præd' secunda alienatione præfat' Christophero Yates sic ut præfertur fact' debet' & insolut' bene cognoscit in præd' Clauso in quo, &c. Et iuste, &c. ut in parcell' tenementorum prædict' cum pertin' de ipsius Decano & Capitulo in forma præd' tenent' ac infra secundum & dominicum suum, &c. Et hoc parat' est verificare unde pet' judicium & retorn' averiorum præd' unacum dampnis misis & custag' suis per ipsum in hac parte sustent' secundum formam Statuti in hujusmodi casu edit' & provis' sibi adjudicari, &c.

That there was so much due for a Fine by the Custom.

And because the same were in Arrear and unpaid, the Defendant distrained.

Infra secundum, &c.

Et præd' Thomas die' qd' cognitio præd' Johannis præd' ac materia in eadem content' minus sufficien' in lege existunt ad præd' Johannem Lancaster captionem averiorum præd' in prædict' loco in quo, &c. iustam cognoscend' Qd'q; ipse ad cognitionem ill' modo & forma præd' fact' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde ex quo præd' Johannes Lancaster captionem averiorum præd' superius cogn' idem Thomas pro defectu sufficien' cognitionis prædict' Johannis Lancaster in hac parte pet' judic' & dampna sua occasione captionis & injustæ detentionis averiorum illorum sibi adjudicari, &c.

Demurres to the Conuance.

Et præd' Johannes Lancaster ex quo ipse sufficien' materiam in lege ad ipsum Johannem ad captionem averiorum prædict' in prædict' loco in quo, &c. iustam cognoscend' habend' manutenend' superius allegavit quam ipse paratus est verificare quam quidem materiam præd'

Joynder.

præd' Thomas non dedic' nec ad eam aliqualit' respond' set verificacionem illam admittere omnino recusat ipse præd' Johannes Lancaster ut prius pet' judicium & retorn' averiorum prædict' unacum dampnis misis & custagiis per ipsum in ea parte sustent' juxta formam Statuti in hujusmodi casu edit' & provis' sibi adjudicari, &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam judicium inde reddant dies dat' est partibus præd' hic usque a die Sancti Michaelis in tres septimanas de audiendo inde judicio suo eo qd' iidem Justic' hic inde nondum, &c.

Holland versus Lancaster.

In Replevin, for taking of 8 Cows in a place called the Barnyard, in the Isle of Thanet in Kent.

The Defendant made Conufance as Bayliff to the Dean and Chapter of the Cathedral Church of Canterbury, and sets forth, that the Dean and Chapter were seised of the Mannor of Moncton in fee, jure Ecclesiæ; and that one John Sabin Baronet, was seised of 3 Messuages, 4 Barns 140 acres of Marsh in the Isle of Thanet, unde locus in quo est & a tempore, &c. fuit parcell', and held them of the said Dean and Chapter as of their said Mannor, by fealty, and the Rent of 6l. 2s. and 6d. ob. yearly, payable at Michaelmas; and shewed that the said Dean and Chapter were seised of the said Rent by the hands of the said Sir John Sabin, as by the hands of their very Tenant, and lay a Custom in the said Mannor, quod post quamlibet alienationem in feodo vel de Statu liberi tenementi alicujus parcell' terr' vel tenement' tent' de Manerio præd' Dom' Manerii præd' pro tempore existen' cum talis alienatio acciderit habuit & habere consuevit redd' unius anni & mediet' redd' unius anni per quem talia terræ vel tenementa sic alienar' tent' fuer' in Manerio præd' nomine finis pro alienatione, and lays a Custom to distrain for the said Alienation fine, and then sets forth an alienation of the said Messuage and Premises by the said Sir John Sabin to one Walter Tyndall in fee, and shews that the said Walter Tyndall made another alienation in fee to one Christopher Yates, and so sets forth, that there were two fines due upon the said alienations, after the rate aforesaid, amounting to 18 l. 7 s. and 7 d. ob. and that he as Bayliff of the said Dean and Chapter, captionem præd' bene cognoscit in præd' loco in quo ut in parcell' tenement' præd'.

To this the Plaintiff demurred, and it was spoken to at the Bar the last Term, and likewise this Term: The main thing was, that the Custom, as it was said, was not good; for the Alienation fine is set forth to be due upon the Alienation of any parcel of Lands or Tenements held of the said Mannor, to have
a year

a year and halfs Rent, by which the Lands or Tenements so aliened were held; so that if the 20th part of an Acre be aliened, a fine is to be paid; and that of the whole Rent for every parcel is held at the time of the alienation by the whole Rent, and no apportioning thereof can be but subsequent to the Alienation; and this the whole Court held an unreasonable Custom; and it is set forth it could not be otherwise understood than that a fine should be due, viz. a year and halfs Rent upon the Alienation of any part of the Lands held by such Rent.

The Court doubted also whether the Custom was good as to the claiming an Alienation fine upon an Alienation for Life, because by that the tenure of the Lands aliened is not altered, for the Reversion is still held as before by the same Tenant. *Judicium pro Quer.*

Colley versus Helyar.

IN an Action of Debt for 34 l. the Plaintiff declared against the Defendant an Attorney of this Court, presente hic in Cur. in propria persona sua upon a Bond of 34 l.

The Defendant pleads in Bar, quoad quinque libras sex solid. & tres denar. of the aforesaid 34 l. that the Plaintiff post consecutionem Scripti Obligat' predicti, scilicet vicesimo, &c. anno, &c. p quoddam Scriptum suum acquietantie cognovisset se accepisse & habuisse de pred. Defendente 5 l. 6 s. and 3 d. in part solutionis majoris summae, and pleaded a frivolous Plea as to the rest of the Bond, to which the Plaintiff demurred.

And it was argued, that the Acquittance under the Plaintiffs Hand and Seal for 5 l. 6 s. and 3 d. part of the Bond due might have been pleaded in bar of the whole; and that if the Defendant here had relied upon it, it should have barred the Plaintiff of the whole. Vide for that matter, *Hollingworth and Whetston, Sty. 212: Allen 65. Beaton and Forrest.* Note, there the payment was since the Action brought, and pleaded in abatement; where it was said, that it could not be so pleaded without an Acquittance. Vide *Kelw. 20. 162. 3 H. 7. 3 B. receipt of parcel pending the Writ, 7 Ed. 4. 15. a.* But it seems clear by the Book, of *Edw. 4. 207. Mo. 886. Speak versus Richards.* That if part be received, and an Acquittance given before the Action, it is a Bar only of so much, but it seems the Action must be brought for the whole.

Dickman *versus* Allen.

Cantab' ff. **A** BRAHAMUS ALLEN nup de Grancester in Com' prædicto Ycom' attach' fuit ad respondend' Roberto Dickman Gen' de placito transgr' sup Casum, &c. Et unde idem Robertus per Robertum Drake Attorn' suum queritur quare cum Præpositus & Scholares Collegii Regalis Beatæ Mariæ & Sancti Nicholai in Cantabr' in Com' præd' seisit' fuissent de uno Capitali Messuagio cum pertinen' in Grancester in Com' prædicto ac de centum & sexaginta acris terræ arrabil' jacen' in Communibus Campis de Grancester prædicta cum pertinen' in dominico suo ut de feodo in jure Collegii sui prædicti iidemq; Præpositus & Scholares & omnes ill' quorum statum ipsi habuer' de & in tenementis præd' cum pertinen' a tempore cujus contrarii memoria hominum non existit habuer' & habere consuever' p se Firmariis & Tenentibus suis eorundem Tenementorum cum pertinen' libertatem Faldagii (Anglicè, foldage) omnium Ovium (Ovibus suis p'priis & Ovibus tenen' & occupatorum p tempore existen' quorundam Messuagiorum & Terrarum in Villa de Coton in Com' præd' qui a tempore cujus contrarii memoria hominum non existit respectu usi fuer' intercoiare causa vicinagii in quibusdam Communibus Campis de Grancester præd' cum Ovibus suis in & super præd' Messuagiis & terris suis in Coton præd' levan' & cuban' except') suor' & depascen' infra Communes Campos & territoria de Grancester prædicta a vicesimo quinto die Martii usque primum diem Novembris quolibet anno sup prædictas centum & sexaginta acras terras arabil' percipiend' & saldand' tanquam ad tenementa prædicta cum pertinenciis pertinen' prædictisque Præposito & Scholaribus Collegii præd' de Tenementis prædictis cum pertinen' in forma prædicta seisit' existen' Præpositus & Scholares postea scilicet decimo nono die Octobris Anno Domini millesimo sexcentesimo octogesimo primo apud Grancester prædictam quodam Johanne Copleston Sacræ Theologiæ Professor' adtunc Præposito Collegii prædicti existen' p quandam Indenturam inter ipsos Præpositum & Scholares ex una parte & quendam Johannem Wittewronge Mil' & Barronet' ex altera parte factam cujus alteram partem Sigillo coi ipsorum Præpositi & Scholarium signat' idem Robertus Dickman hic in Cur' profert cujus dat' est eisdem die & anno dimiser' & ad firmam tradider' eidem Johanni Wittewronge Tenementa prædicta cum pertinen' habend' & occupand' præfat' Johanni & Assign' suis a tempore confectionis Indenturæ illius usque plenum finem & terminum viginti ann' extunc px' sequen' & plenar' complend' & finiend' Virtute cujus dimissionis prædictus Johan' in Testa præd' cum pertinen' intravit & fuit inde possessionat' Et sic inde possessionat' existen' idem Johannes postea scilicet decimo die Augusti Anno Domini millesimo sexcentesimo octogesimo secundo apud Grancester prædictam di-

Cafe brought against the Defendant for not folding his Sheep upon the Plaintiffs Land, according to Custom. The Colledge of St. Mary and St. Nicholas seized in Fee j. re Collegii.

A Custom for all the Tenants to fold their Landlords Land.

Common of Vicinage.

Levant and Couchant.

From such a day to such a day.

The Principal and Scholars demise to the Plaintiff by Indenture.

Habendum.

For 21 years.

Lessee enters.

dimisit & ad firmam tradidit eidem Roberto Dickman Tenementa prædicta cum pertinen' habend' & occupand' eidem Roberto & Assign' suis a Festo Sancti Michaelis Archi tunc px' sequen' usque plenum finem & terminum sex annorum extunc px' sequen' & plenar' complend' & finiend' virtute cujus dimissionis idem Robertus in crastino dicti Festi Sancti Michaelis Arch' Anno Domini millesimo sexcentesimo octogesimo secundo supradicto in Tenementa prædicta cum pertinen' intravit & fuit inde possessionat' usque finem & expirationem ejusdem termini prædictus tamen Abrahamus præmissorum non ignarus sed machinans & fraudulentè intendens ipsum Robertum minus rite prægravare ac eum de faldagio prædicto ut præfertur habend' impedire ac de proficuo & commoditate inde totaliter privare diu ante finem termini prædicti ult' mentionat' scilicet primo die Maii Anno Regni Domini Jacobi secundi nuper Regis Angliæ tertio Oves (videlicet ducent' Oves ipsius Abrahami in Communes Campos de Grancester præd' ibidem depasturand' posuit & Oves ibidem eun' & depascend' extunc usque decimum diem Septembris tunc px' sequen' existen' ante finem termini prædicti ult' mentionat' custodivit & continuavit sed Oves ill' in aut super prædictas centum & sexaginta acras terræ arrabilis ipsius Roberti vel in aut super aliquam inde parcellam minime faldavit sicut ipse debuisset nec permisit ipsum Robertum habere beneficium faldagii carum prædicto Abrahamo duran' eodem termino non existen' tenen' sive occupatore aliquorum messuag' sive terrarum in Villa de Coron præd' de quibus tenen' sive occupator' inde p' tempore existen' a tempore cujus contrarij memoria hominum non existit usi fuer' intercoicæte Causa vicinagii in prædictis Communibus Campis de Grancester prædict' cum Ovibus suis prædict' ut præfertur per quod idem Robertus pficuum & advantagium faldagii Ovium prædictorum super prædictas centum & sexaginta acras terræ arabil' quibus ipse gaudere debuisset p' tempus illud omnino pdidit & amisit ad dampnum ipsius Roberti quadraginta librarum & inde pduc' Sectam, &c.

Et prædictus Abrahamus per Richardum Pyke Attorn' suum ven' & defend' vim & injur' quando, &c. Et dic' qd' ipse in nullo est culpabilis de pmissis prædictis supius ei imposit' put prædictus Robertus supius versus eum queritur Et de hic pon' so sup Patriam Et prædictus Robertus similiter Ideo præcept' est Vic' qd' venire fac' hic a die Sanct' Trin' in tres septimanas duodecim, &c. p' quos, &c. Et qui nec, &c. ad recogn', &c. quia tam, &c.

And Demised
to the Plaintiff

For six years.

The Lessee Eit-
tera.

The Cause of
Action.

For not Fold-
ing his Sheep
according to
Custom.

Per quod the
Plaintiff lost
the benefit of
Foldage.

Not Guilty
pleaded.

Dickman *versus* Allen.

IN an Action upon the Case, the Defendant declared, That the Provost and Scholars of Kings College in Cambridge were seised in fee in jure Collegii of a Messuage in Grancester in Cambridge, and 160 Acres of Arable Land, lying in the Common fields of Grancester aforesaid; and the said Provost, &c. and all those whose Estate they have in the Tenements aforesaid, have time whereof, &c. for themselves, their Farmers and Tenants of the said Tenements, libertatem Foldagii (Anglicè, Foldage) omnium Ovium (except, &c.) euntium & depascentium infra Communes Campos & Territoria de Grancester præd' super præd' centum & sexaginta Acres Terræ p'cipiend' & foldand' tanquam ad præd' Tenement' pertinent', and then sets forth a Lease made by the Provost and Scholars to Sir John Witwong of the said Messuage and 160 Acres for 20 years, which said Sir John let them to the Plaintiff for six years, by virtue whereof the Plaintiff entered and was possessed; and the said Defendant, Præmissorum non ignarus, did put 200 Sheep into the Common fields of Grancester aforesaid, and there kept and depastured them for a certain time; sed Oves illas in aut super præd' centum & sexaginta Acres Terræ Arab' ipsius Quer' vel in aut super aliquam inde parcell' minime foldavit sicut ipse debuisset nec permisit ipsum Querentem habere beneficium foldagii earundem (and shews how the Defendant was not within exception) by which the Plaintiff lost the profit of the Foldage, &c. and laid it to his damage of 40 l.

The Defendant pleaded not guilty, and a Verdict was for the Plaintiff. And it was moved in Arrest of Judgment, that the Plaintiff had not in his Declaration set forth a sufficient Cause of Action; for he saith that the Defendant had not folded his Sheep upon the 160 Acres as he ought; and it is not set forth, that the Custom was for the Owner of the Sheep to bring his Sheep to fold them upon the said Lands.

But it was objected on the Plaintiffs part, that the word Foldagium did imply as much, and it was the usage in Norfolk and Suffolk for the Owner of the Sheep to put his Sheep into the Lords Land and fold them there, for which the Lord provided Purlies, and prepared the fold to receive them; and of this Foldagium a fine was levied of inter al' as is reported in 1 Ed. 3. fo. 2. and the usage in Norfolk and Suffolk is there mentioned. And it was said in a Possessory Action 'tis enough to say sicut debuit, without setting forth any particular Custom or Prescription: And Dent and Olivers Case was cited, 2 Cro. 122. where an Action was brought for disturbing of him in taking of Toll ad Feriam ipsius le Plaintiff spectan'; and it was moved after Verdict, that he made

made no Title by Prescription or Custom to the Toll, and it was held by the Court to be sufficient in a possessory Action to say, *ad Feriam suam spectant*: So also in an Action for stopping of a way belonging to his House, without setting forth any Prescription, between St. John and Moody, a late Case; and if this *sicut debuit* is not sufficient, 'tis laid further in the Declaration, that he did not permit the Plaintiff to have the benefit of this Foldage.

But the Court held the Declaration insufficient, for that there is no Authority in any Book of Law to shew that the word *Faldagium* did imply so much as was pretended on the Plaintiffs part; *Faldagium* is to have Sheep folded in his ground, as *Falde cursus* is a Sheep-walk or feed for his Sheep; and if it be the usage in case of Foldage for the Owner of the Sheep to bring his Sheep to the Fold, it ought to have been so set forth, for the Court cannot take notice of the private usages of Countries; and if the *Faldagium* did imply what the Plaintiff would have it, then it should have been set forth, that the Plaintiff had set up a Fold in the Land where the Sheep were to have been folded, for he was to do the first act, which must have been shewn, if all the particulars had been set forth; and *sicut debuit* is not enough here for the obscurity of the word *Faldagium*; so that it doth not appear to the Court what ought to have been done on the Defendants part; and to say *non permittit Querentem habere beneficium Faldagii*, was not good without shewing how he disturbed him, as 8 Co. in Francis Case. Sed nota, That was upon Demurrer; but here 'tis not said *non permittit* the Plaintiff habere *Faldagium*, or *non permittit eum faldare*, but *non habere beneficium faldagii*; so that it was not certain what was meant, for the Sheep might be folded, and yet he might be deprived of the benefit of the foldage: And the Chief Justice said, here the Prescription is laid to have the Sheep going *infra Communes Campos & Territoria de Grancester* to be folded, and *Territoria* is a word unknown in the Law, so no certainty in the Prescription.

Note, Here a Prescription is laid in a Body Aggregate, in a que Estate, but that was held to be well enough, because for a thing appurtenant to the Manor, Vide 2 Cro. 673. Kelw. 140. B. 1 Inst. 121. a. But for the Reasons above mentioned, the Judgment was stayed by the Opinion of the whole Court.

George *versus* Butcher.

DEbt upon a Bond. The Defendant Demands Oyer of the Condition, which was to perform certain Articles of Agreement; and the Defendant set forth the Articles made between the Defendant of the first part, the Plaintiff of the second part, and Rebecca Morse Widow, Joseph Morse, Samuel Morse, John Morse, Daniel Morse, Nathaniel Morse, Robert Morse and Thomas Morse, Sons of the said Rebecca of the third part, by which it was recited, that a Marriage was intended between the Defendant Butcher, and the said Rebecca, by means whereof the Defendant would become possessed of her Personal Estate; and in consideration thereof the Defendant covenanted by the said Articles, inter alⁱ (having also recited that Robert Morse deceased Father of the said Joseph Morse, Samuel Morse, John Morse, Daniel Morse, Nathaniel Morse, Robert Morse and Thomas Morse had by his Will bequeathed cuilibet ipsorum prædⁱ Josepho, Samuel, Johan, Daniel, Robert & Thoⁱ (omitting Nathaniel) the sum of 50 l.) with the Plaintiff, that the said Defendant would pay prædⁱ Josepho, Samuel, Johan, Nathaniel, Robert & Thoⁱ prædictⁱ several legationes vel summas quinquaginta librarⁱ; and the Defendant pleads further, that he paid to the said Joseph, Samuel, John, Daniel, Robert and Thomas the said several sums of 50 l. and thereby performance of all the other Articles.

And to this the Plaintiff demurred, because that he did not shew that he paid 50 l. to Nathaniel Morse, and expressly covenanted to pay to the said Nathaniel and the rest, the said several Legacies of sums of 50 l.

Sed non allocatur, for in the recital of the said Bequest by the Will, there is nothing mentioned to have been bequeathed to Nathaniel, and thoⁱ he covenants to pay to Nathaniel as well as the rest, yet it is legationes vel summas prædⁱ, and there being no Legacy to Nathaniel, and that appearing by the recital of the Will, his Covenant shall not oblige the Defendant to pay him any thing. Et sic Judicium p^r Defendente.

Trethewy versus Elkendon.

In Replevin: The Plaintiff declared of taking his Cattle in a place called the Barnhole in Branwell in the County of Cornwall.

The Defendant made Conuſance, as Bayliſſ of Elizabeth Coſſen, and ſhews that Nicholas Coſſen was ſeſſed in fee of a Meſſuage and Lands, of which the place where was and is parcel, and being ſo ſeſſed the 9th of September in the fourteenth year of the late King Charles the Second, by his Deed indented produced in Court, did grant to the ſaid Elizabeth Coſſen an annual Rent of 10 l. to be iſſuing out of the Premises, to have to the ſaid Elizabeth and her Assigns for term of her Life, payable at the uſual Feaſts, and in caſe it were arrears that it ſhould be lawful for her to diſtrain, by virtue whereof the ſaid Elizabeth Coſſen (who is ſtill living) became ſeſſed of the Rent for her Life; and avers that the uſual Feaſts are our Lady, Midſummer, Michaelmas and Chriſtmas, and for 40 l. for four years Rent ending at Michaelmas 1688. the Defendant took the ſaid Cattle as a Diſtreſs for the arrear of Rent, &c.

The Plaintiff demanded Oyer of the Indenture, which was read, containing as followeth, viz. This Indenture made the 29th day of September, &c. between Nicholas Coſſen, &c. of the one part, and Elizabeth Coſſen, &c. and Nicholas Coſſen the younger Son of the ſaid Elizabeth, of the other part witneſſeth, That whereas the ſaid Elizabeth Coſſen hath given and ſurrendered into the hands of the ſaid Nicholas Coſſen one Indenture of Leaſe of an Annuity, dated the 15th of March 1657. of ten pounds yearly, going out of all that his Barton and Demerſh called *Melot*, for a term yet to come, as in and by the ſaid Indenture of Leaſe more fully and at large appeareth, hath Given, Granted and Confirmed, and in and by theſe Preſents, doth Give, Grant and Confirm unto the ſaid Elizabeth Coſſen, her Heirs and Assigns by theſe Preſents, one Annuity or Yearly Rent of ten pounds, to be iſſuing and going out of all that his Barton, &c. to Have, Receive and take yearly the ſaid Annuity to the ſaid Elizabeth Coſſen and Nicholas Coſſen the younger, and the Survivor and Survivors of them, at the uſual Feaſts in the Year, by equal Portions; and if it ſhall happen the ſaid Yearly Rent to be behind after any of the ſaid Feaſts, that then it ſhall and may be lawful to and for the ſaid Elizabeth, during her Natural Life, and ſo the ſaid Nicholas Coſſen the younger,
after

after her Death, to enter into the Premises, and distrain, &c. In Witness whereof, &c.

Quibus lectis & auditis idem Querens dicit quod cognitio præd' in forma præd' fact' & materia in eadem content' ac factum indentat' præd' in forma præd' fact' minus sufficien' in lege existunt, &c. and the Defendant joyned in Demurter.

It was argued for the Plaintiff, that there is no sufficient Grant by this Indenture, for it is said to be made between Nicholas of the one part, and Elizabeth and Nicholas Cossen junior of the other part, and then recited the Surrender of a former Grant; after which came the words, hath Given and Granted, and by these Presents doth Give and Grant, &c. and no Grantor named, but if it should be taken for a Grant from Nicholas Cossen, 'tis a Grant to Elizabeth and her Heirs, and the habend' cannot alter the Premises in the limitation of the Estate in the Grant of a Rent; and the Defendants in their Plea set forth, that the said Elizabeth was seised of the said Rent for her Life, ut de libero Tenemento, so there is a material variance between the Indenture and the Plea.

The Court were of Opinion as to the first matter, that it was a good Grant, the Indenture being between Nicholas Cossen of the one part, and Elizabeth of the other part; and then after a recital saith, hath Given and Granted to Elizabeth, &c. That must be taken, that Nicholas Cossen hath Given and Granted, and that the Consens setting her forth to be seised for Life, whereas there passed an Estate in fee, was a material variance.

The Chief Justice Pollexfen seemed to incline, that it was a Rent-charge for Life, for the power of Distress was given to her only for Life, and a Rent-sec in fee, and that it was as a Grant of two several Rents, and then the Pleading was good.

But the other Justices held it was one entire Rent, and that she had it with a Privilege of Distress during her Life only; but leave was given to amend the Consens upon payment of Costs.

Dod versus Dawson.

Scire Facias upon a Recognizance of Bail in this Court; upon condition, That if Judgement should be had against the Principal in an Action of Debt for 2000 l. in this Court, that he should pay the Debt and Damages recovered; or render his Body in Execution to the Prison of the Fleet; and sets forth, that he recovered the said Debt of 2000 l. and 12 l. pro damnis, Termino Paschæ, 4 Jacobi Secundi nuper Regis, and that the Defendant did not pay the said Money, nor render himself in Execution, &c.

The Defendants plead to this Scire fac' that the Money, prætextu cognitionis præd' in præd' brevi de Scire fac' mentionat' de Terris & Catallis, &c. præd' Defendantis fieri & ad usum præd' Timothei Dod levare non debet quia dicunt quod Narratio super qua Judicium præd' in præd' Brevi de Scire fac' mentionat' obtent' fuit versus ipsum Willielmum Dawson, seu aliqua alia narratio in placito debiti non fuit exhibit' in Curia hic in Termino Paschæ Anno Regni dicti nuper Regis primo quo Termino cognitio præd' facta fuit nec ad aliquod tempus infra duos terminos post præd' Terminum Paschæ proxime sequen' unde pro defectu Narr' per præfatum Timotheum Dod versus præfat' Willielmum Dawson in eadem Cur' ante finem præd' duorum terminorum præd' summa duarum mille librarum per cursum legis de Terris & Catallis præd' Defend' vel eorum alicujus fieri & levare non debent & hoc parat' sunt verificare unde per' Judicium, &c.

So this the Plaintiff demurs, and Judgment was given for the Plaintiff; for altho' by course of the Court, if the Defendant lie in Prison two whole Terms, without any Declaration put in, he may get a Rule to be discharged; yet if a Declaration be afterwards delivered, and Judgment thereupon, 'tis a good Judgment, and the Bail will be liable in such case.

Rogers versus Bradly.

In a Rep'evin for taking of a Cow apud Liscard in Cornwall, in a certain place, there called the Underway.

The Defendant made Conusans as Bayliff to William Trewman and Thomas Coll, and sets forth that Joseph Mark diu ante, &c. was seised in fee of a Close called Underway, parcel of the Mannor of Liscard, of which the place where was and is parcel according to the Custom of the said Mannor; and being so

so seised the 9th day of January, Anno Domini 1663. demised to Sampson Rogers the Premises for 99 years from the Date of the Indenture, if A. B. &c. should so long live, rendering 10 l. yearly Rent, by virtue whereof the said Rogers entered, and the said Joseph Mark being seised of the Reversion in fee, secundum consuetudinem Manerii præd' upon the first day of February, Anno 1663. supradict' at a Court of the said Mannor then held, did surrender in Manus Domini Caroli Secundi nuper Regis Angliæ, &c. ad tunc Domini Manerii præd' secundum consuetudinem Manerii prædict', the aforesaid Reversion and Rent to the use of the said Trewman and Coll, and their Heirs, to which said T. and C. at the Court præd' Dominus Rex per quendam Thomam Moulton ad tunc Seneschal' suum Manerii præd' did grant the said Reversion and Rent to hold to them and their Heirs, according to the Custom of the said Mannor, and by virtue thereof the said T. and C. became seised of the said Reversion and Rent in their Demesne as of fee, according to the Custom of the said Mannor, and for five years Rent, ending at Michaelmas, &c. bene cognoscunt captionem, &c.

To this the Plaintiff replied, and the matter in the Replication was frivolous, and Demurrer thereupon.

But the Court gave Judgment for the Plaintiff, because the Consideration was insufficient; for the Lands whereupon the Distress was taken, being freehold (for so they must be taken to be, tho' it is shewn that Mark was seised according to the Mannor, because it is not said at the Will of the Lord), could not be conveyed by Surrender in Court, and an admittance without an Especial Custom to pass them in that form; and 'tis not enough to say, that he surrendered them secundum consuetudinem Manerii, but the Custom should have been fully set forth, viz. quod infra Manerium præd' de tempore, &c. talis habebatur consuetudo, &c. but here the Custom is by Implication, 1 Cro. 185 Vaughan 253. 2 Leon. 29.

Lade *versus* Baker and Marsh.

Kanc' ff. **T**HOMAS BAKER & Nicholaus Marsh suū fuer' ad respondend' Philippo Lade Gen' de placito quare ceper' averia ipsius Philippi & ea injuste detinuer' contra Vad' & Pleg', &c. Et unde idem Philippus per Brian' Courthope Attorn' suum queritur qd' prædicti Thomas & Nicholaus vicesimo die Marci Anno Regni Domini Jacobi Secundi nuper Regis Angliæ, &c. quarto apud Barham in quodam Clauso Terræ ibidem (vocat' le fourteen Acres) cepit averia ipsius Philippi videlicet tres Spadones & unam Equam & ea injuste detinuer' contra vad' & pleg' quousque, &c. unde idem Philippus dic' qd' ipse deteriorat' est & dampnum habet ad valenciam viginti librar' Et inde produc' Sectam, &c.

Declaration in Replevin.

Et prædicti Thomas Baker & Nicholaus Marsh per Johannem Wade Attorn' suum ven' & defend' vim & injur' quando, &c. Et idem Nicholaus Marsh bene advocat ac prædict' Thomas Baker ut Ballivus ejusdem Nicholai bene cogn' caption' averiorum præd' in prædicto loco in quo, &c. & juste, &c. quia dicunt qd' prædict' locus in quo supponitur caption' averiorum præd' fieri continet & prædicto tempore quo, &c. continebat in se quatuordecim acr' Terræ cum pertin' in Barham præd' qd'q, diu ante prædict' tempus quo, &c. quidam Robertus Lade Armig' & Lancelot Lade filii prædict' Roberti Lade fuer' seisis' de eisdem quatuordecim acr' Terræ inter alia in Dominico suo ut de feodo & sic inde seisis' existen' iidem Robertus Lade & Lancelot Lade diu ante prædict' tempus quo, &c. scilicet primo die Octobris Anno Regni Domini Caroli Primi nuper Regis Angliæ, &c. vicesimo quarto apud Barham præd' per quoddam Scriptum suum Indentat' inter ipsos Robertum Lade & Lancelot' Lade per nomina Roberti Lade de Barham in Com' Kanc' Armig' & Lancelot Lade fil' prædict' Roberti Lade ex una parte & quendam Nicholaum Marsh nuper defunct' Avum præd' Nicholai Marsh modo defend' per nomen Nicholai Marsh de eadem Yeom' ex altera parte ibidem fact' cujus script' alteram partem sigillis præd' Roberti Lade & Lancelot Lade sigillat' iidem Thomas Baker & Nicholaus Marsh modo Defend' hic in Cur' profert cujus dat' est eisdem die & anno pro & in consideratione centum libr' bonæ & legalis Monet' Angliæ eidem Roberto Lade in manibus solut' pro seip'is & Hæred' suis deder' concesser' & confirmaver' præfat' Nicholao Marsh Avo & Hæredibus suis quandam annuat' five annual' reddit' octo libr' bonæ & legalis Monet' Angliæ exeunt' de omni il' Capital' Mesuagio five Tenito cum pertin' in Barham præd' & exeun' de omnibus terris & hereditament' in Barham præd' Mesuagio prædicto spectan' & tunc in occupatione prædicti Roberti Lade unde prædict' locus in quo, &c. est & prædict' tempore quo, &c. fuit parcell' Habend' tenend' percipiend' & recipiend'

Avoary and Conizant.

Seisin in Fee in Jointenants.

And by Deed graet an Annuitiy.

Issuing out of the Capital Mesuage.

end' annual' reddit' præd' præfat' Nicholao Marsh Avo Hæred' & Assign' suis mperpetuum ad solum opus & usum prædicti Nicholai Marsh Avi Hæred' & Assign' suorum imperpetuum solvend' Annuatim apud mesuagium præd' ad Festa Annuciaconis Beatæ Mariæ Virgis & Sancti Michaelis Archi per equales portiones vel infra octo dies px' post quodlibet prædictorum Festorum Et si contigeret præd' annuitat' sive annual' reddit' octo libr' sive aliquam inde partem aretro fore & insolut' per spacium octo dierum px' post aliquod præd' Festorum solution' dierum qd' tunc & deinceps licit' foret prædicto Nicholao Marsh Avo Hæred' & Assign' suis in præmissis præd' intrare & distringere & distractiones illas imparcare quoulsque prædictus Nicholaus Marsh Avus plene content' & solut' foret inde sub conditione qd' si præd' Robertus Lade vel Lancelot Lade Hæred' vel Assign' sui vel eorum aliquis bene & fidelit' solveret vel solvi causaret prædicto Nicholao Marsh Avo Hæred' vel Assign' suis summam centum librarum legalis Monet' Angliæ cum arceragiis si aliqua essent ad vel super diem Sancti Michaelis Arch. qui esset in Anno Dom' Dei nostri milles. quinquages. sexcentis. primo apud mesuagium præd' qd' tunc concessio illa & omnia in eadem content' foret vacua & nullius valor' in lege aliqua re antea content' in contrarium non obstant' prout per idem scriptum Indentat' plenius apparet Et iidem Thomas Baker & Nich' Marsh modo Defend' ulterius dicunt qd' nec præd' Robertus Lade vel Lancelot Lade Hæred' vel Assign' sui vel aliquis eorum solverunt aut solvi causaver' nec eorum aliquis solvit aut solvi causavit præfat' Nicholao Marsh Avo in vita sua præd' summam centum libr' super præd' Festum S. Michaelis anno Dom' millesimo sexcentesimo quinquagesimo primo præd' secundum formam & effectum Conditionis in Script' Indentat' præd' virtute cujus quidem concessionis prædictus Nicholaus Marsh Avus de Annual' reddit' præd' fuit seiscit' in dominico suo ut de feodo & sic inde seiscit' existen' prædictus Nicholaus Avus ante prædict' tempus quo, &c. scilicet vicesimo octavo die Novembris Anno Dom' millesimo sexcentesimo quinquagesimo quarto apud Barham præd' condidit Testamentum & ultimam Voluntat' suam in script' & per eandem voluntat' suam (inter alia) devisavit præd' annuitat' sive annual' reddit' octo libr' Aliciæ Exec' ejus pro & duran' vita sua natural' pro education' & vict' nept' suorum Ann' & Aliciæ Waters quousque pervenirent ad seperal' etat' octodecim annorum & post Uxor' suæ mortem & tal' etat' octodecim annorum præd' Ann. & Alicæ Walters tunc prædictus Nicholaus Avus per ult' voluntat' suam prædictam voluit qd' filium suum Rich. Marsh & Hered' sui haberent præd' annuitat' sive annual' reddit' octo libr' solvend' decem libr' seperatim (Anglicè a pte) prædict' Ann' & Aliciæ Waters & decem libr' legalis monet' Angl' Nich. Waters fratri præd' Ann & Aliciæ Waters infra sex menses px' post mortem Ux' suæ si essent etat' præd' ad eandem recipiend' & extunc voluit & legavit præd' annuitat' sive annual' reddit' octo libr' prædict' filio suo Rich.

Hæred' to the
Grantee in Fee.

And if behind,
in 8 days to
distrain.

Upon Condi-
on to be void
upon payment
of a sum of
100 l. in fu-
ture.

The 100 l. was
not paid.

The Grantee
made his Will.

And Devised it
to his Wife for
the education
of his Children.

After his Wives
death to his
Sons.

Rich. & Hered' suis imperpetuum & prædict' Nicholaus Avus post
 consecution' test'i sui prædicti & ante prædictum tempus quo, &c.
 scilicet primo die Julii Anno Dom' millesimo sexcentesimo quinquagesimo septimo apud Barham præd' obiit sic inde seisit' post cujus
 quidem Nicholai Marsh Avi mortem prædict' Alicia Ux' ejus virtute
 test'i præd' seisit' fuit de præd' annuitat' sive annual' reddit' octo libr'
 in dñico suo ut de libero test'o pro term' vitæ suæ Et sic inde seisit'
 existen' prædicta Alicia Ux' prædicta Nich. Marsh defunct' diu ante
 prædictum tempus quo, &c. scilicet tertio die Junii Anno Dom' millesimo sexcentesimo quinquagesimo octavo apud Barham præd' obiit
 post cujus quidem Aliciæ Ux' mortem prædict' Rich. Marsh fuit
 seisit' de præd' annuitat' sive annual' reddit' octo libr' in dominico
 suo ut de feodo & solvit præd' sepeal' legata præfat' Ann. & Alicie
 & Nich. Waters secundum formam & effectum testamenti præd'
 scilicet apud Barham præd' Et sic inde seisit' existen' prædict' Rich.
 Marsh diu ante prædict' tempus quo, &c. scilicet decimo die Augusti Anno Regni Dom' Caroli Secundi nuper Regis Angliæ, &c. tricesimo secundo apud Barham præd' per quoddam Scriptum suum
 Indentat' inter ipsum Rich. Marsh per nomen Rich. Marsh de Swingfield in Com' Kane' Yeom' ex una parte & præd' Nich. Marsh modo defend' per nomen Nich. Marsh filii prædict' Rich. ex altera parte
 ibidem fact' cujus scripti alteram partem sigillo prædict' Rich. Marsh sigillat' iidem Tho. Baker & Nich. Marsh modo defend' hic in Cur' proferunt cujus dat' est eisdem die & anno pro & in consideratione naturalis amoris & affectionis quæ gessit prædicto Nich. modo defend' filio suo & summæ quinque libr' legalis monet' Angliæ per præd' Nich. Marsh modo defend' eidem Rich. Marsh & Assign' suis solvend' secur' (Anglicè. secured) duran' vita sua natural' ad duos dies solutionis in anno & pro diversis aliis bonis causis & considerationibus ipsum Rich. ad hoc movent' dedit & concessit assignavit & transposuit prædict' Nichol' Marsh filio suo modo defend' Hæred' & Assign. suis præd' annuitat' sive annual' reddit' octo libr' habend' & tenend' dict' annuitat' sive annual' reddit' octo libr' prædict' Nicholao Marsh filio modo defend' Hered' & Assign' suis ad solum opus & usum prædict' Nicholai filii modo defend' Hæred' & Assign' suorum imperpetuum sub conditione qd' si Hæred' vel Assign' prædict' Roberti Lade tunc defunct' vel prædict' Lancelot Lade Hæred' vel Assign' sui vel aliquis eorum bene & fidelit' solveret vel solvi causaret prædicto Nicholao Marsh filio modo defend' Hæred' vel Assign' suis summam centum & octodecim libr' legalis monet' Angliæ apud Capital' Mesuag' præd. ad vel super Festum diem Sancti Michaelis Archi p' sequen' dat' præd. Indentur' ult' mentionat' qd' tunc prærecitat' fact' annuitat' & omnia articula claus. & res in eadem content' foret vacua frustra & nullius valoris aliqua re in eadem mentionat' in contrarium non obstant' pat' per idem scriptum indentat' ult' mentionat' plenius apparet Et idem Thomas Baker & Nicholaus Marsh modo defend' ulterius

The Testator died.

The Wife seised
Virtute Testamenti.

And died.

The Son seised.

And paid the Legacies.

And conveyed the Deed to the Defendant.

Hæredum;

The Uses.

Upon Condition.

The Money was not paid.

*Figure Concessi-
onis, and of the
Statute of Uses.*

*The Defendant
was seised
In Dominico suo
ut de feodo.*

*For 6 years
Rent due the
Distress was
made.*

*The one De-
fendant bene
advocat, and
the other bene
cognovit.*

*As in Lands
charged with
the Distress.
Demurrer.*

Joynder.

rius dicunt qd' Hæred' vel Assign' prædict' Roberti non solverunt nec solvi causaver' nec prædict' Lancelot Lade Hæred' vel' Assign' sui vel aliquis eorum solvit vel solvi causavit præfat' Nich. Marsh modo defend' præd. summam centum & octodecim librarum super præd. Festum Sancti Michaelis tunc p' sequen' secundum formam & effectum Conditionis in prædict' scripto indentat' ult' mentionat' Virtute cujus quidem concessionis & assignationis ult' mentionat' ac vigore cujusdam Statuti fact' apud Westm' in Com' Midd' quarto die Februarii Anno Regni Domini Henrici octavi nuper Regis Angliæ, &c. vicesimo septimo de usibus in possessionem transferend' præd' Nich. Marsh modo defend' prædict' tempore quo, &c. fuit & adhuc est seisit' de præd' Annuitat' sive annual' reddit' octo libr' in dominico suo ut de feod' Et quia quadraginta & octo libr' de reddit' præd' per sex Annos integros finit' ad Festum Sancti Michaelis Archi p' ante prædict' tempus quo, &c. prædict' Nich. Marsh modo defend' aretro fuer' & insolut' ad præd' Festum Sancti Michaelis Arch' prox' ante præd' tempus quo, &c. & per octo dies p' post idem Festum & prædict' tempore quo, &c. idem Nich. Marsh modo defend' in jure suo propr' bene advocat Et prædict' Thomas Baker ut Ballivus prædict' Nich. Marsh modo defend' bene cogn' caption' averiorum prædictorum in prædicto loco in quo, &c. pro eisdem quadraginta & octo libr' de reddit' præd' sic aretro existen' & juste, &c. ut in terris distriction' prædict' Nich. Marsh modo defend' in forma prædict' onerat' & obligat', &c.

Et prædictus Philippus Lade dic' qd' per aliqua per præd' Thomam Baker & Nicholaum Marsh superius in advocacione præd' alleg' iidem Thomas Baker & Nicholaus Marsh captionem averiorum prædictorum in prædicto loco in quo, &c. justam cognoscere non debent quia dicit qd' placitum præd' per eosdem Thomam Baker & Nicholaum Marsh modo & forma præd' superius placitat' materiaque in eodem content' minus sufficien' in lege exist' ad captionem averiorum prædictorum in prædicto loco in quo, &c. justam cognoscend' ad quod idem Philippus Lade necesse non habet nec per Legem Terræ tenetur aliquo modo respondere Et hoc parat' est verificare Unde pro defectu sufficien' placit' in hac parte idem Philippus Lade pet' judic' & dampna sua præd' occasione captionis & injuste detentionis averiorum prædictorum sibi adjudicari, &c.

Et prædict' Thomas & Nicholaus ex quo ipsi sufficien' materiam in Lege ad ipsum Nicholaum captionem averiorum prædictorum in prædicto loco in quo, &c. justam advocand' Et ad ipsum Thomam ut Ballivum ipsius Nicholai eandem captionem in eodem loco justam cognoscend' in advocare & cognitione suis prædictis superius allegaver' quam ipsi parat' sunt verificare quam quidem materiam prædictus Philippus non dedic' nec ad eam aliquatit' respond' pet' judicium & retorn' averiorum prædictorum unacum dampnis, &c. sibi adjudicari, &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam

usquam Judicium inde reddant dies dat' est partibus prædictis hic usque à die Sancti Michaelis in tres septimanas de audiend' inde Judicio suo eo qd' iidem Justic' hic inde nondum, &c.

Lade versus Baker & Marsh.

R Eplevin for taking his Cattle at Barrham in Kent, in a place there called the Fourteen Acres.

The Defendant Baker made Confessans as Balliff of Nicholas Marsh, and saith, that diu ante præd' tempus quo, &c. one Robert Lade was seised in fee of the said 14 Acres, and by his Deed indented, dated 1 Octob. 24 Car. 1. between him of the one part, and Nicholas Marsh, Grandfather of the said Nicholas Marsh of the other part, and produceth the said Deed in Court, in consideration of 100 l. paid to him by the said Nicholas Marsh the Grandfather, did grant to the said Nicholas Marsh and his Heirs, an annual Rent of 8 l. to be issuing out of all that Capital Messuage with the appurtenances, in Barham aforesaid, and out of all Lands and Hereditaments in Barham aforesaid, to the said Messuage belonging, and then in the occupation of the said Robert Lade, unde prædict' locus in quo est & præd' tempore quo, &c. fuit parcell' to be paid at our Lady Day and Michaelmas by equal portions, with power to distrain, if the said Rent, or any part thereof were behind.

And the Defendant further saith, that by virtue of the said Grant, the said Nicholas Marsh the Grandfather, became seised in fee of the said Rent; and being so seised by his Will in Writing, dated the 28th. of November 1654, devised the said Rent to Richard Marsh and his Heirs, and died; by virtue whereof the said Richard Marsh became seised in fee of the said Rent, and being so seised, diu ante prædict' Tempus, quo, &c. viz. 10 Aug. 32 Car. 2. nuper Regis, by his Deed indented between him of the one part, and the said Nicholas Marsh the Defendant, Son of the said Richard of the other part, cujus Scripti alteram partem Sigillo prædict' Richard Marsh (omitting sigillat') idem Thomas Baker the Defendant hic in Cur' profert for and in consideration of Natural Love and affection which he bore to the said Nicholas now Defendant, his Son, and the sum of 5 l. yearly by him the said Nicholas to the said Richard Marsh, during the Life of the said Richard, secured to be paid, and for divers other good causes and considerations concessit assignavit & transposuit to the said Defendant Nicholas Marsh and his Heirs the said Annuity or yearly Rent of 8 l. to the use of the said Nicholas Marsh the Defendant and his Heirs;

prode

prout per idem Scriptum Indentat. plenius apparet Virtute cujus quidem concessionis & assignationis ulterius mentionat. & vigore Statuti Anno Regni Hen. 8. nuper Regis Angliæ vicesimo septimo de usibus in possessionem transferend. prædict. Nich. Defend' fuit & adhuc est seisit. de prædict. annual. reddit. &c. and for 48 l. for six years arrears at Michaelmas next before the taking of the Cattle, to the said Nicholas the Defendant bene cognoscit ut Ballivus ipsius Nicholai, &c.

To this the Defendant demurs.

First. It is not sufficiently shewn that the Place where, &c. was charged with the Rent, for the Rent is granted out of a Messuage with the appurtenances in Barham, and out of all the Lands in Barham aforesaid to the said Messuage belonging, and then in the occupation of the said Robert Lade unde prædict. locus in quo est & tempore quo, &c. fuit parcell. and tho' it were parcel at the time of the Distress taking, it might not be belonging to the said House, or in the tenure of Lade at the time of the Rent granted, which should have been shewn, and of that Opinion were the Court.

Secondly. In the Deed by which the Defendant Nicholas Marsh claims, it is said sigillo prædict. Rich. Marsh, (omitting sigillat.)

Sed non allocatur, for it is said before that per Scriptum indentat. factum inter, &c. he granted, and that is enough.

Thirdly. Here is a grant of the Rent from Richard Marsh pleaded without any Attornment or Enrollment To which it was answered by the Counsel for the Defendant, that it appeareth that the Grant was made in Consideration of Natural Affection as well as Money, and so it shall enure as a Covenant to stand seised; and for this the Case of Crossing and Scudamore was cited, Pas. 23 Car. 2. Rot. 871. where in Ejectment it was found by Special Verdict that Nicholas Hele was seised of Lands in Fee, and that he made a Deed to Jane Hele, enrolled within six Months, by which he did, for and in consideration of Natural Love, Augmentation of her Portion, and the Preferment of Her in Marriage, and other good and valuable Considerations, Give, Grant, Bargain and Sell, Alien, Enfeoff and Confirm unto the said Jane and her Heirs the said Lands. And in the said Deed there was a Covenant, that after due execution, &c. the said Jane should quietly enjoy, and also a clause of warranty; and the Jury found that there was no other Consideration than what was expressed in the Deed, ut supra; this Deed could not enure as a Bargain and Sale, but it was adjudged that it should work as a Covenant to stand seised; and Watts and Dix's Case was also cited, Sry. 188, 204 where Rolls said if Lands are passed for

passed for Honey only, the Deed ought to be enrolled, but if for Honey and Natural Affection the Land will pass without Enrollment.

The Court here in the Principal Case inclined, that this Grant would work as a Covenant to stand seised.

But Pollexfen Chief Justice was of Opinion that it ought to have been so pleaded, and not to use the words concessit assign. & transposuit, which is to plead it as a Grant at Common Law.

Powell and Ventris did conceive that it was pleaded sufficiently, in regard it was said that by virtue of the Deed and Statute of Uses he became seised; but leave was given by the Court to amend the Plea as the Defendant should see cause.

Bland versus Haselrig & alios.

Quarto Jacobi Secundi the Case was, an Assumpsit was brought against four, who pleaded non Assumpsit infra sex annos, and the Verdict was, that one of the Defendants did assume infra sex annos, and the other non assumpsit. And it was moved that no Judgment could be given against the Defendant, upon whom the Verdict was found, for this is an Indeb. assump. for Goods sold, and 'tis an intire contract, and they must all be found to promise, or else 'tis against the Plaintiff.

Torts are in their nature several, so one Defendant may be found guilty and the other not guilty, but 'tis not so in Actions grounded upon Contract.

Pollexfen Chief Justice, Powel and Rokeby were of Opinion in this Case, That the Plaintiff could not have Judgment.

Ventris inclined to the contrary, he admitted if an Indebitatus assumpsit be brought against four, and they plead non assumpsit, and found that one of them assumed, this is against the Plaintiff, for he falls in his Action. But in the case at Bar it may be taken, that they did all promise at first, and that one of them only renewed the promise within six years: The plea of non assumpsit infra sex annos implies a promise at first, and if one should renew his promise within six years 'tis reason it should bind him, and the Plaintiff must sue them all, or else he will vary from the Original Contract.

But the Chief Justice seemed to be of an Opinion, that if the promise were renewed within the six years, yet if not upon a new Consideration, it should not bind; and if there were a new Consideration, the Action will lie against him that promised

sed alone. Sed Quære, for the common Practice is upon a Plea of the Statute of Limitations to prove only a renewing the Promise without any further Consideration, but a bare owning the Debt is not taken to be sufficient, Quære, if the first Consideration upon repeating the Promise within six years be not enough to raise a new Cause of Action. Judgment was given for the Defendant.

Westby's Case.

Westby brought an Action by Original, and the Instructions to Cursitor for drawing of the Writ were Westby, but the Writ was Westly, and so all the Proceedings. Afterwards the Court upon a motion ordered the Cursitor to attend, who satisfied the Court that the Instructions were right, and so they ordered the Original to be amended in Court, and this without any application to the Chancery or Order from thence, and they amended all the proceedings after.

Termino

Termino Pasche, Anno 2 Willielmi & Marie.

In Communi Banco.

Ellis *versus* Yates.

IN an Action of Trespas the Writ was brought, and so recited, Quare clausum fregit & herbam ibid' crescent' conculeavit & consumpsit & averia fugavit; and the Declaration was, Quare clausum & herbam ibid' crescent' conculeavit & consumpsit & bidentes, &c. fugavit & alia enormia, &c.

Upon Not guilty pleaded, a Verdict was found for the Plaintiff. It was moved in Arrest of Judgment, that fregit was omitted in the Declaration, so one of the Trespases contained in the Writ, viz. the Clausum fregit was not mentioned in the Declaration, and if the Writ contains more than is Declared for; this is a Variance not aided by the Verdict, 1 Cro. 329. Hasklop and Chaplin, where a Replevin was de averiis, and declares only of an Horse, and for that the Judgment was Reversed in a Writ of Error. So where the Writ was Quare clausum fregit, and the Declaration Quare clausum, 1 Cro. 185. Edwards and Watkin.

Pollexfen Chief Justice and Rokeby were of that Opinion, that Judgment should be arrested.

Veneris contra (Powel being absent) because the treading and consuming of the Grass necessarily implied a breach of the Close; for there could not be an Entry without a Breach. So the Declaration by necessary Inference comprehended all that was in the Writ, and to support the Verdict it was reasonable to intend no other breach of the Close, than by a bare Entry: But the other two said, That there might be given in Evidence a breach of a Gate or Hedge, and Damages might be given for that, and then there was no ground for such Damage set forth in the Declaration.

And by the Opinion of the Chief Justice and Rokeby the Judgment was stayed.

Vid. Keilway 187. B. finding in a Verdict upon a Writ of Forcible Entry, that the Defendant expulit, discessivit, &c. this implies it was Vi & armis, and yet that is the very point of the Action.

The Warden of the Fleet's Case.

A Motion was made by the Warden of the Fleet, for a Writ of Privilege sitting the Parliament, alledging that he was obliged to attend the House of Lords, and therefore ought to be privileged from Suits; and divers Presidents were shewn, where Writs of the like nature were granted to the Warden of the Fleet upon Motion, one whereof was 2 Car. 1. and divers since that time, some whereof appeared to be upon hearing of Counsel on both sides.

And the Court were at first inclined to grant him the like Writ; but it being afterwards made appear to the Court, that he was freed upon Escapes, and the Court considering the great inconvenience that would ensue thereupon, and being of Opinion that it was in their Discretion, whether they would grant such Writ upon Motion or no. For they could not Judicially take notice of this Privilege of Parliament, and therefore in case he had such Privilege, the Court said he might plead it, if he would; but they would not grant him such Writ upon Motion: Or if his Privilege were infringed by the parties prosecuting a Suit against him, he might complain to the Lords for a breach of Privilege.

Anonymus.

There was a Judgment by Default, which the Defendant let go by Default depending upon the Mistake in the Original. Now suspecting that the Plaintiff had discovered it, and so would procure another Original that should be right, he moved the Court by Serjeant Birch, that he might have Oyer of the Original; and this was intended to prevent the procuring of another.

But the Court denied the Motion, and said, It was usual for a Plaintiff to take out his Original after Judgment Entered.

Beaumont *versus* Weldon.

IN an Assumpsit the Plaintiff declared upon several Promises, three whereof were for finding of Lodging for so many Months for the Wife of the Plaintiff at his Request, and the last Promise was an Indebitavit for Goods and Wares sold to the Defendant himself.

The Defendant pleaded in Bar, That long before the Plaintiff had found his Wife any Lodging, (viz.) such a day his Wife went away from him without his Consent, and lived in Adultery with some person or persons unknown to the Defendant from that time to this present; and that the Plaintiff, before he had provided her any Lodging, had notice of that her Departure; notwithstanding which the Plaintiff provided her Lodging, and also sold to her the said Goods and Wares, supposed in the Declaration to be sold to the Defendant, without any assent or notice of the Defendant, absque hoc quod assumpsit super se modo & forma prout predictus Querens superius versus eum queritur, & hoc paratus est verificare, &c.

To this the Defendant Demurred generally; and it was Argued that the Plea was naught both as to the Matter and Form. It was said, the great Case of Scot and Manby was Resolved chiefly upon the express Prohibition that the Husband had given to Trust his Wife. Mod. Rep. 9. Dier and East it was said That the Wife should have been Endowed tho' she eloped before the Statute of Westm. 2. cap. 34. and as to the manner of pleading, it is altogether insufficient; for it amounts to the General Issue, and he should have traversed the Request: And for the Goods and Wares alledged to be sold to the Defendant himself, there is no Answer given at all; but only said, That the Wares supposed to be sold to the Defendant, were sold and delivered to the Wife; which is nothing to the purpose.

The Court, as to the Special Matter pleaded, gave no Opinion; but seemed to agree, that upon Non Assumpsit pleaded, the Matter set forth in the Plea would have been good Evidence for the Defendant.

Vid. the Opinion of some of the Judges in 2 Siderfin in Scot and Manby's Case 129. and the Court held that the Plea amounted to the General Issue, as to the Lodging found for the Wife; but then this was cured upon a General Demurrer. But because there was nothing pleaded to the Indebitavit Assumpsit laid for the Wares alledged to be sold to the Defendant himself, they were of Opinion to give Judgment for the Plaintiff.

Nora, The Traverse absque hoc, as this Pleading is, amounteth to no more than a Protestation. Vid. Kelway 187.B.

Brown *versus* Rands.

The Plaintiff brought an Action of Debt for 400 l. and Declared upon two Bonds, each of them in the penalty of 200 l.

The Defendant demands Oyer of the several Bonds, and of the Conditions of each Bond; which Conditions reciting, that a Marriage was intended between the Defendant and Anne Stow, One of them was to permit and suffer her to dispose of her Personal Estate, and to permit the person and persons, to whom she should dispose of it, to enjoy it; and the other Condition was to permit her to give away 5 l. and that the Defendant should pay it within two Months after her Decease: And to each of these Bonds the Defendant pleaded, Quod Condicio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque & hoc paratus est verificare.

To this the Plaintiff demurred, It was insisted on for the Defendant that this Plea was good, and should give the Plaintiff to assign a Breach; for the Matter did not lye within the Notice of the Defendant, whether she had made any disposition of her Personal Estate, or had given the 50 l. and so could plead no otherwise than thus.

But the Court held the Plea to be naught, and that for saving of the Bond, it is necessary for the Defendant to shew how he hath performed the Condition, and this manner of Pleading was never admitted.

Lechmere & al' *versus* Toplady & al'.

Trover brought
for a great
many Goods.

Lond. ff. **A**LICIA Toplady nuper de London Vid' Benjamin' Thorowgood nuper de eadem Mil' Thomas Kinsey nuper de eadem Mil' & Georgius Benson nuper de eadem Servien' ad Clavam attach' fuer' ad respondend' Nicholao Lechmere & Sabian' Coles mercatoribus de placito Transgr' super Casum Et unde iidem Nicholaus & Sabian' per Humfridum Wall Attorn' suum queruntur quare cum prædict' Nicholaus & Sabian' quarto die Junii Anno Domini Millesimo sexcentesimo octogesimo sexto apud London' videl't in paroch' Beatæ Mariæ de Arcubus in Warda de Cheape possessionat' fuissent de bon' & catal' sequen' (videl't) de ducent' vigint' & quinque libris legalis monet' Angl' in pecun' numerat' ac de decem pipis (Anglicè pipes) & quingent' lazen' (Anglicè gallons) Vini Hispanici (Anglicè vocat' Canary) duobus buttis (Anglicè butts) dimid' Cadi

The particulars of the
Goods.

Cadi (Anglicè half *Dogheads*) & ducent' & quinquagint' lagen' Vini Hispanici (Anglicè vocat' *Sherry*) duabus buttis & ducent' & quinquagint' lagen' Vini Hispanici (Anglicè vocat' *Malaga*) quinque Tonnis (Anglicè *Tons*) vigint' Cadis (Anglicè *Dogheads*) & mille lagen' Vini Gallici (Anglicè *Whitewine*) decem tonnis quadragint' cadis septem vasibus ((Anglicè vocat' *fats*) un' pipa & duobus mille lagen' Vini Gallici (Anglicè vocat' *Claret*) duobus vasibus (Anglicè *fats*) tribus cadis & trecent' lagen' Vini Rhenens' (Anglicè vocat' *Rhenish*) un' cado un' Tertia (Anglicè *Tertre*) & sexagint' lagen' Vini Hispanici (Anglicè vocat' *Cent*) sex duoden' (Anglicè *dozen*) ampullar' (Anglicè *bottles*) implet' cum Vino Hispanico (Anglicè vocat' *Canary*) octo duoden' ampullar' implet' cum Vino Gallico (Anglicè vocat' *Claret*) septem duoden' ampullar' implet' cum Vino Gallico (Anglicè vocat' *Whitewine*) vigint' & tribus vasibus (Anglicè *Casks*) tribus circulis (Anglicè *Stewhoops*) duodecim ferreis circulis (Anglicè *Iron-hoops*) duobus cantharis (Anglicè vocat' *Cans*) sex Infundibulis (Anglicè *funnels*) sex Cupis (Anglicè *Cups*) un' par' cranor' (Anglicè *Cranes*) & hancher (Anglicè *Hanchers*) vigint' librat' ponderibus Nicotian' sex duoden' librat' pōder' Candelar' (Anglicè *Candles*) trigint' duoden' ampullar' Vitriar' (Anglicè *Glass-bottles*) un' Crate (Anglicè *Kange*) duobus Fenforibus (Anglicè *fenders*) tribus Battillis (Anglicè *firehovels*) tribus Forcipibus (Anglicè *pairs of Tonges*) un' furca Ignar' (Anglicè *firefork*) duabus cranis (Anglicè *Cranes*) & hamis (Anglicè *Hooks*) duobus uncis pro veribus (Anglicè *Sptracks*) duobus craticulis (Anglicè *Gird-irons*) duobus Ignitabulis (Anglicè *Chaffingdishes*) duobus tripis (Anglicè *Trevels*) duobus Anforiis (Anglicè *Chopping-knives*) un' pixid' ferrea (Anglicè *Box-Iron*) quatuor calefactor' (Anglicè *Heat-ers*) un' Veruversorio (Anglicè *Jack*) un' catena & ponderibus (Anglicè *Weights*) tribus verubus (Anglicè *Sptrs*) un' solle (Anglicè *pair of Bellows*) un' pixid' pro Sale (Anglicè *Salt-box*) un' unco pro Sartagine (Anglicè *a rack for a frying-pan*) un' instrument' ferreo (Anglicè vocat' *a Plate-frame*) tribus ollis ereis (Anglicè *Brass-Pots*) & tegminibus (Anglicè *Covers*) tribus scutellis (Anglicè *Saucepans*) duobus ereis caldariis (Anglicè *brass Bottles*) sex ereis ignitabulis (Anglicè *brass Chaffingdishes*) un' ereo caleficio leQuali (Anglicè *Warmingpan*) vigint' & novem patinis Stanneis (Anglicè *Peewterdishes*) tribus malluviis (Anglicè *Basons*) quinque duoden' & dimid' (Anglicè *Dozen and half*) lamin' (Anglicè *Plates*) tribus catillis (Anglicè *Porringers*) tribus scutellis (Anglicè *Saucets*) un' lamina (Anglicè *Pasty-plate*) quatuor lamini p caseo (Anglicè *Cheese-plates*) duobus saltariis (Anglicè *Saltcellars*) novem matulis (Anglicè *Chamber-pots*) duobus ferreis diguttoriis (Anglicè *Iron Dippingpans*) duobus sartaginibus (Anglicè *fryingpans*) vigint' & tribus mensis (Anglicè *Tables*) septem tapet' (Anglicè *Carpets*) nonagint' & quatuor cathedris (Anglicè *Chairs*) duobus sedil' (Anglicè

glicè **Stools**) un' pixid' pro aromat' (anglicè **Spice Box**) un' erea
 sicula (anglicè **Pail**) un' fulcro (anglicè **Turnupbed**) quatuor lect'
 pulvinar' (anglicè **Featherbeds**) quatuor cervical. (anglicè **Boulsters**)
 sex pulvinar' (anglicè **Pillows**) quatuor lodic' linear' (anglicè **Blankets**)
 quatuor par' lodic' linear' (anglicè **Sheets**) quatuor opiment. (anglicè
Tugs) quatuor fulcris (anglicè **Bedsteads**) un' stannea cisterna
 (anglicè **Cistern**) un' cantharo continen' tres quartas (anglicè **Three**
quart Pot) un' plumbea cisterna un' plumbea sentina (anglicè **Sink**)
 un' pipa plumbea un' area papilla adinde affix' (anglicè a **Lead Pipe**
 and **Brass Cock**) quadragint' & sex duoden' ampullar' vitrear'
 tribus duoden' stannea candelabra (anglicè **tin Candlesticks**) duo-
 bus ereis candelabris un' cantharo continen' quarter' pinte (anglicè
Quarter Pot) novem cantharis continen' dimid' pinte (anglicè
Halfpint Pot) vigint' & quatuor cantharis continen' pintas (anglicè
Pint Pot) octo cantharis continen' quartas (anglicè **Quart Pots**)
 duobus cantharis continen' duas quartas (anglicè **Pottle Pots**)
 quatuor cratibus ignear' (angl. **firegrates**) tribus tintinnabulis un'
 plumbeo tegmin' (angl. **Lead Cover**) duabus celdis carbon' (angl.
Chaldron of Coals) quatuor cratibus (angl. **Stoves**) un' lagen'
 (angl. **Gallon**) aceri duabus postibus (angl. **Posts**) un' furca ferrea
 (angl. **Spud**) un' cantharo (angl. **Black Jack**) un' abaco (angl.
Euphorb) sex cultris (angl. **Knives**) tribus curtinis (angl. **Curtains**)
 un' par' curtin' & vallene' (angl' a **Suit of Curtains and Wallence**)
 novem par' peritromat' (angl. **Suits of Hangings**) duabus cistel-
 lis (angl. **Chests of Drawers**) quatuor picturis (angl. **Pictures**) un'
 lanterna (angl. **Lanthorn**) duabus duoden' vitrij (angl. **Glasses**) un'
 par. andelar' (angl. **Andirons**) quinque par' catellor' ferreor' (angl.
Iron Dogs) tribus catellis ferreis quinque pec' tapet' (anglice
Tapestry) un' pec' ligni (angl. vocat. a **Hoyle for drying Cloaths**)
 un' cista pipar' (angl. a **Chest of Pipes**) un' sentina (angl. **Closetfool**
 and **Pan**) undecim pec' ferri pro circulis (angl. **Irons for Hoops**)
 quingent' fascibus (angl. **flaggots**) & sex lanternis (angl. **Sconces**)
 ad valenc' quingent' librar' legalis monet' Angl' ut de pecun' bon' &
 catallis ipsor' Nicholai & Sabian' propr' Et sic inde possessionat' existen'
 ipsi iidem Nicholaus & Sabian' postea scilicet eisdem die & anno
 apud London' prædict' in Paroch' & Warda prædict' pecun' bon' &
 catall' ill' extra manus & possession' suas casualit' perdider' & amiser'
 Quæ quidem pecun' bon' & catall' postea scilicet eisdem die & anno
 apud London' prædict' in Paroch' & Warda prædict' ad manus &
 possession' prædict' Aliciæ Benjamini Thomæ & Georgii per Inven-
 con' devener' prædict' tamen Alicia Benjaminus Thomas & Georgius
 scien' pecun' bon' & catall' præd' fore pecun' bon' & catall' ipsor'
 Nicholai & Sabian' propr' & ad ipsos Nicholaum & Sabian' de
 Jure spectare & pertinere machinan' tamen & fraudulent' intenden'
 eosdem Nicholaum & Sabian' de pecun' bon' & catall' præd' in hac
 parte callide & subdole deipere & defraudare pecun' bon' & catall'
 prædict'

prædict' licet sæpius requisit', &c. eisdem Nicholao & Sabian' seu eorum alteri nondum deliberaver' nec eorum aliquis deliberavit Sed pecun' bon' & catall' ill' postea scilicet die & anno ult' prædict' apud London' præd' in Paroch' & Warda præd' in usum suis propr' converter' & disposuer' Ad dampnum ipsius Nicholai & Sabian' quingent' librar' Et inde producunt sectam, &c.

Et prædict' Alicia Benjaminus Thomas & Georgius per Carol' Draper Attorn' suum ven' & defend' vim & injur' quando &c. Et quoad convercon' & disposicon' bonor' & catallor' sequen' (parcell' bonor' & catallor' in Narr' præd' superius mentionat') ad usum ipsor' Alicie Thomæ Benjaminus & Georgii (viz.) decem pipas (Anglicè Pipers) & quindecim lagen' (Anglicè Gallons) Vini Hispanici Anglice vocat' Canary) duas Buttas (Anglice Butts) & dimid' Cadi Anglice half Hogheads) Vini Hispanici (Anglice voc' Sherrey) *And so all the particulars before-mentioned are to come in here verbatim.* — quingent' fascis (Anglice faggots) & sex lanternas (Anglice sconces) iidem Alicia Thomas Benjaminus & Georgius dicunt uod præd' Nicholaus Lechmere & Sabian' Coles accon' suam præd' ide versus eos habere seu manuténere non debent quæ dicunt quod termino Sancti Michaelis Anno regni Domini Jacobi secundi nuper regis Angl', &c. secundo coram ipso nuper Rege apud Westm' in Com' Midd' existen' Nicholaus Lechmere & Sabian' Coles mercator' er Johannem Smith tunc Attorn' suum ven' & protuler' in Cur' icti domini nuper Regis tunc ibidem quandam billam suam versus enjamin' Thorowgood Mil' Thomam Kinsey Mil' Aliciam Toplady & Georgium Benson in custod' Marr', &c. de placito Transgr' Et in e' fuer' pleg' de prosequend' scilicet Johannes Doe & Richardus Doe per quam quidem Billam prædict' Nicholaus Lechmere & Sabian' Coles mercator' querebant de Benjamin' Thorowgood Mil' Thomam Kinsey Mil' Aliciam Toplady & Georgio Benson in custod' Marr' Mafchal' domini nuper Regis coram ipso nuper Rege existen' de eod' ipsi tertio die Junii Anno regni dicti domini Jacobi secundi iper Regis Angl', &c. secundo Vi & armis, &c. bon' & catall' ipsor' Nicholai & Sabian' Coles sequen' videlicet decem pipas (Angl. Pipers) quindecim lagen' (Angl. Gallons) Vini Hispanici (Angl. vocat' Canary) duas Buttas (Angl. Butts) & dimid' Cadi (Angl. half Hoghead) Vini Hispanici (Angl. vocat' Sherrey) duas Buttas Vini Hispanici (Angl. vocat' Malaga) [*Here follows all the before-mentioned Goods*] — undecim pec' ferri pro circulis (angl. Iron hoops) quingent' fascies (angl. faggots) & sex lanternas (angl. sconces) ad valenc' quingent' libr' legalis monet' Angl' apud Lond' vidit' in Paroch' Sancti Dunstani in Occidente in Warda de Fingdon extra adtunc & ibidem invent' ceper' & asportaver' Et ahormia eisdem Nicholao & Sabian' adtunc & ibidem intuler' contra pacem dicti domini nuper Regis, &c. ad dampnum ipsorum Nicholai

The Defendant pleads a Recovery in an Action of Trespass in Bar. The particulars of the Goods.

Action non.

Action brought in the Kings Bench.

The Declaration.

Trespass for taking away of the Goods.

Contra pacem nuper Regis.

Nicholai & Sabian' quingent' & vigint' librar' Et inde produc' sectam, &c.

Imparlance.

Not Guilty
pleaded.

Et postea scilicet die Lunæ prox' post Octab' Sancti Hillar' tunc prox' sequen' usque quem diem prædict' Alicia Benjaminus Thomas & Georgius habuer' licenc' ad Billam præd' interloquend' & tunc ad respondend', &c. coram domino Rege apud Westm' ven' tam prædict' Nicholaus & Sabian' per Attorn' suum prædict' qui prædict' Alicia Benjaminus Thomas & Georgius per Ant' Ward attorn suum & iidem Alicia & Georgius tunc defend' vim & injur' quando, &c. Et dixer' quod ipsi non fuer' inde culpabil' & de hoc posuer' se super Patriam Et prædict' Nicholaus & Sabian' similit', &c. Per quod Præcept' fuit Vic' quod Venire fac' coram dicto domino nuper Rege apud Westm' die Veneris prox' post Crast' Purificacon' Beatæ Mariæ Virginis duodecim, &c. Per quos, &c. Et qui nec, &c. ad Recogn', &c. quam tam, &c. idem dies dat' fuit partibus prædict' ibidem, &c. Postea continuat' fuit inde process' inter partes prædict' de placito prædict' per Jur' posit' inde inter eas in respect' coram domino Rege apud Westm' usque diem Mercur' prox' post Quinden' Paschæ extunc prosequen' Nisi dilect' & fidel' domini Regis Edwardus Herbert Mil' Capital' Justic' domini Regis ad placita in Cur' ipsius domini Regis coram ipso Rege tenend' assign' prius die Martis decimo quinto die Februar' apud Guibald' London per formam Statut', &c. ven' pro defect' Jur', &c. Ad quem quidem diem Martis scilicet decimum quintum diea Februar' ven' coram dicto domino nuper Rege tam prædict' Nicholaus & Sabian' per attorn' suum prædict' quam prædict' Alicia Thomas Benjaminus & Georgius per attorn' suum prædict' Et præfat' Capital' Justic' dicti domini nuper Regis coram quo, &c. mis' hic record' suum coram eo habet' in hæc verba Postea die & loco infracontent' coram prædict' Edwardo Herbert Mil' Capital' Justic' infrascript' associat' sibi Richardo Phillips gen' per formam Statut', &c. ven' partes prædict' per attorn' suos prædict' Et Jur' Jurat' unde infra fit mentio exact' quidam eorum videlicet Thomas Barnelsly Josephus Baggs Johannes Reynolds Richardus Beauchampe Josephus Canne Richardus Browne Johannes Bernard & Thomas Mills ven' & in Jur' ill' Jurat' existunt & quia resid' Jur' ejusdem Jur'o non comparuer' Ideo al' de circumstantibus per Vic' Civit' London, infrascript' ac hoc elect' ad requisicon' prædict' Nicholai & Sabian' ac per mandat' Capital' Justic' prædict' de novo apponunt' Quorum Nomina pannello infrascript' affilantur secundum formam Statut' in hujusmodi casu inde nuper edit' & provis' Et Jur' sic de novo apposit' videlicet Nicholaus Bendy Jacobus Woods Edwardus Falkingham & Kenelm Smith exact' similit' ven' & in Jur' ill' Jurat' existunt Qui ad veritat' de infracontent' simulcum al' Jur' prædict' prius ad hoc imparnellat' & Jurat' dicend' elect' triat' & Jurat' dixer' super Sacram suum quod diu ante præd' tempus quo, &c. scilicet vicesimo octava die Aprilis Anno regni domini nostri Regis nunc secundo quida

Return of the
Posse.

Tales.

The Jury find
a Special
Verdict.

Jobann

Johannes Toplady adtunc & diu antea existen' negotiator (Anglicè a Trader) uten' & exercen' negotium (Anglicè Trade) Vinarij (Anglicè a Vintner) & viam & modum suum vivendi emendo & vendendo & adtunc existen' indebitat' diversis person' in diversis magnis denar' Summis ultra ducent' libr' legalis monet' Angl' præd' vicesimo octavo die Aprilis devenisset Decoctor (Anglicè a Bankrupt) infra Statut' fact' contra Decoctores (Anglice Bankrupts) Et Jur' prædict' ulterius super Sacrum' suum præd' dicunt quod Termino Paschæ anno regni dicti domini Regis nunc primo quoddam Judicium & recuperac' in Cur' domini nostri Regis nunc coram ipso Rege apud Westm' præd' habit' fuer' pro mille libr' de debito necnon septuagint' & tribus solid' & quatuor denar' de dampn' prout per record' Judic' præd' in Cur' dicti domini Regis coram ipso Rege apud Westm' remanen' plenius liquet & apparet Et Jur' prædict' ulterius super Sacrum' suum præd' dicunt quod quoddam breve de Fieri fac' Jur' prædict' modo hic in evidenc' osten' super Judicium præd' p præfat' Aliciam Toplady emanat' & prosecut' fuisse Vic' London' direct' per quod quidem breve mandat' fuit Vic' London' quod de bon' & catall' præd' Johannis Toplady in balliva sua Fieri fac' tam præd' mille libr' de debito quam prædict' septuagint' tres solid' & quatuor denar' qui eidem Aliciæ in eadem Cur' coram dicto domino Rege adjudicat' fuer' pro dampnis suis quæ sustin' tam occon' detencon' debiti illius qui pro misis & custag' suis per ipsum circa Sextam suam in hac parte apposit' & denar' ill' habeat' coram dicto domino Rege apud West' die lunæ prox' post Cris̃ Ascencon' Domini ad reddend' præfat' Aliciæ pro debito & dampn' prædict' Quod quidem breve de Fieri fac' postea scilicet vicesimo nono die Aprilis anno ult' supradict' deliberat' fuit per prædict' Aliciam p̃fat' Benjamine Thorowgood & Thomæ Kinsey tunc Vic' London' existen' in forma Jur' exequend' quodque prædict' Benjaminus Thorowgood & Thomas Kinsey & prædict' Georgius Benson tunc existen' un' Servien' ad Clav' eorundem Vic' per eor' Warrant' super præd' breve de Fieri fac' & per ordin' & direcon' præd' Aliciæ postea scilicet eodem vicesimo nono die Aprilis & non antea bona & catalla in Narr' ipso' Nicholai & Sabian' menconat' in custod' ipso' Benjamine & Thomæ Kinsey receperunt asportaver' & seisiver' Et Jur' prædict' ulterius super Sacram' suum præd' dixer' quod duran' tempore quo bon' & catall' prædict' sic fuer' in custod' prædict' Vic' ac ante aliquam vendicon' vel disposicon' inde fact' quidam Process' (vocat' an Extent) extra Cur' dom' Regis de Scaccario apud Westm. versus prædict' Johannem Toplady prosecut' fuisse Tenor' cujus quidem p̃cess' Jur' prædict' modo hic in evidenc' osten'. sequitur in hæc verba s̃. Jacobus Secundus Dei gratiâ Angl' Scot' Franc' & Hiberniæ Rex fidei defensor' &c. Vic' London' salutem cum Richardus & Holder Edwardus Cooke ambo Mercat' de Roodlane & Richardus Powney Wincoopet de Parklane London per scriptum suum

That the Owner of the Goods was a Vintner.

And became a Bankrupt.

And a Judgment recovered against him for 1000 l.

A Fieri fac' issued out upon it.

And delivered to the Sheriff.

A Serjeant at Mace, by Order and direction of the Sheriffs, seize the Goods in Execution. That after seizure and before sale, a Prerogative Process issued out against the Goods. The Writ found in the writ.

*Inquisition
found.*

*The Bankrupt
indebted.*

*Ad Inquirend
what Goods
and Chattels,
Lands and
Tenements.*

*And to Extend
them in qui-
buscunque
manibus.*

obligator' sigillis suis sigillat' geren' dat' septimo die Novembr' anno regni nostri primo deven' tent' in nobis quadragint' libr' bonæ & legalis monet' Angl' solvend' ad certum diem p̄terit' & eas nobis nondum solver' nec solvi fecer' ut dicitur Cumque per quamdam Inquisicon' indentat' capt' apud Guihald' Civit' Lond' scituat' in Paroch' sancti Laurentii in veteri Judaismo in Warda de Cheape ejusdem Civitat' primo die Maij anno regni nostri secundo coram vobis præfat' Vic' Civit' London virtute brevis nostri de extend' sub sigillo Scaccarii nostri versus præfat' Ric. Holder. vobis direct' compert. exist. per Sacrum. Daniel. Man & al. probor. & legal. hom. Civitat. prædict' quod quidam Johannes Toplady de London t̄ntner prædict' die caption. p̄dict' Inquisicon. indebitat. exist. præfat' Richardo Holder in summa Centum & sexagint. librar. bonæ & legalis monet. Angl. pro tant. denar. debit. pro Vin. per eundem Ric. Holder prædict' Johanni Toplady vendit. & deliberat. Quam quidem summam Centum & sexagint. librar. prædict' vos præfat' Vic. dicto die caption. Inquisition. prædict' virtute brevis p̄dict' in manus nostras cap. & seisciri fecistis put per breve præd' & retorn. ejusdem & præd' Inquisicon. eidem brevi annex. in Scacc. nostrum certificat. & ibidem in custod. Rememoratoris nostri remanen. plenius apparet Nosque de dictis Centum & sexagint. libr. nobis jam debit. omni celeritate qua poter' satisfieri volen. quod est Justum vob. præcipimus quod non omitt. propter aliquam libertat. quin in ead. ingred. & tam per Sacrum. proborum & legal. hominum de ballivâ vestra vel aliter per Sacrum. & testimonium aliquorum proborum & legalium hominum de eadem balliva vestra per quos rei veritas melius scire poterit quam omnibus al. viis mediis & modis quibus melius sciveritis aut poteritis diligenter Inquir. quas terr. & quæ ten. & cujus annui valoris prædict' Johannes Toplady habuit in dicta balliva vestra dicto primo die Maij anno regni nostri secundo quo die nobis primo debitor inde devenit seu unquam postea hucusque necnon quæ & cujusmodi bon. & catall. & cujus pretii Ac quæ debit. credit. Specialit. & denar. Sum. prædict' Johannes Toplady modo habet in dicta balliva vestra eaque omnia & singula prædict' bon. & catall. terr. & tenementa debit. credit. Specialit' & denar. Sum. in quorumcunque man. jam exist. per Sacrum. præfat. proborum & legalium hominum diligent. appretiari & extendi ac in manus nostras capiatis & seisciri fac. ut ea quousque nobis de debit' prædict' plene satisfact. fuit habeamus juxta formam Statut. per hujusmodi debit. nostris recuperand. inde nuper edit. & provis' Ac vobis ulterius præcipimus & potestat' damus per præsentis ad quascunque person. in præmissis existimari idon' coram vobis advocand. ac de & in eisdem præmissis diligent. examinand. ne hoc præsens mandat. nostrum reman' ulterius exequend. & qualiter hoc Præcept' nostr. fuerit execut' Baron. de Scaccario nostro apud Westm' octavo die instan. mensis Maij distinct' & aperte constare fac. & habeatis ibi hoc breve p̄viso quod bon. & catall. ill. quæ in manus nostras

nostras occasione hujus brevis nostri ceperitis ea non vendatis nec
 vendi faciatis quousq; al' de nobis habuer' in mandat' Teste Edwardo
 Atkyns Mil' apud Westm' quarto die Maij anno regni nostri secundo
 per breve & Inquisicon' præd' ac per præd' Actum in Parliament
 anno tricesimo tertio nuper Regis Henrici octavi tent' edit' ac per
 Warrant' Baron' Jenner & p Barones Aylofffe Executio istius brevis
 patet in quadam Inquisic' huic brevi annex' Respons' Thomæ Kinsey
 Mil' & Benjamin' Thorowgood Mil' Vic', London fl. Inquisitio in-
 dentat' capt' apud Guihald' Civitat' London scituat' in paroch' sancti
 Laurentii in veteri Judaismo in Warda de Cheape ejusdem Civitat'
 sexto die Maij anno regni domini nostri Jacobi secundi Dei gratia
 Angl' Scot' Franc' & Hiberniæ Regis fidei defensor', &c. secundo
 coram Thoma Kinsey Mil' & Benjamin' Thorowgood Mil' Vic. Civit.
 Lond' præd. Virtute cujusdñ brevis dicti domini Regis eisdem
 Vic' direct' & huic Inquisicon' annex' ad inquirend' de & super
 quibusdam materiis in eodem brevi content' & spec' per Sacrum
 Danielis Man Willielmi Church Richardi Beauchampe Philippi Per-
 rey Johannis Phillips Johannis Pope Johannis Tayler Josia Tulley
 Johannis Dodd Willielmi Haywood Johannis Middleton & Thomæ
 Pounsett proborum & legalium hominum de Balliva præfat' Vic'
 qui dicunt super dictum Sacrum suum quod Johannes Toplady in
 dicto brevi nominat' quarto die instan' Maij possessionat' fuit &
 dicto die caption' hujus Inquisicon' possessionat' exist' ut de bon' &
 catall' suis propr' in balliva præfat' Vic' de diversis bon' & catall'
 in quadam Scheda sive Inventorio huic Inquisicon' annex' men-
 tionat' attingen' in toto secundum valorem super ea apposit' ad
 summam Centum octogint' & trium librar' Quæ quidem bon'
 & catall' prædict' Nos præfat' Vic' prædict' die capcon' hujus
 Inquisicon' Virtute brevis prædict' in manus dicti domini Regis capi
 & seisciri fec' Ac Jur' præd' supra dict' Sacrum suum ulterius dicunt
 quod præd' Johannes Toplady nulla al' sive plur' habet bon' seu
 catall' nec habet aliqua debit' credit' Specialit' seu denar' Sum' nec
 die in dicto brevi mentionat' quo dicto domino Regi de debit' in
 dicto brevi Spec' primo devenit Debitor seu unquam postea hucusque
 al' habuit terras seu tenementa in balliva præfat' Vic' ad notic' eorun-
 dem Jur' quæ modo extendi appretiari vel in manus dicti domini
 Regis cap' seu seisciri possunt in cujus rei Testimonium tam præfat'
 Vic' quam Jur' prædict' huic Inquisicon' sigilla sua apponi fecerint
 die & anno primo supradict'. Si nullus venerit & clamaverit pro-
 prietat' bon' & catall' supramentionat' citra diem veneris decimum
 quartum diem Maij hoc Termino fiat breve de vendicon' exponas
 per Cur'. Butler. An Inventory of the Goods and Chattels of
 John Toplady of London, Wintner, seized by Sir Thomas Kinsey
 Knight and Sir Benjamin Thorowgood Knight, Sheriffs of
 London, by virtue of his Majesties Writ of Extent unto them,

Provisu.

Return of the
Writ.

The Inquisition

The Bankrupt
found possessed.Nulla alia
bona, &c.A Proclama-
tion to claim.An Inventory
of the Goods
seized by the
Sheriffs.

Appraisalment.

The Money
paid to the
party.Petition to the
Lord Chan-
cellor for a
Commission
of Bankruptcy.The Commis-
sion sued out.Commissioners
named.The Commis-
sioners assign
to the Plaintiffs.

directed for One hundred and sixty Pounds found by Inquisition, as the Debt of one Richard Holder; which Writ is Returnable before the Barons of His Majesties Exchequer at Westminster, on the eighth day of this instant May, and Appraised the fourth of this instant May, One thousand six hundred eighty six. Imprimis, five Pipes of New Canary at One hundred and twenty pounds: Item, Two Pipes of old Canary at Thirty pounds: Item, One Butt of new Sherrey at Twelve pounds: Item, Three Hogheads of Galliack at Twenty one pounds. Et Jurator præd' ulterius super Sac' suum præd' dicunt quod præd' quinque Pipæ Vini (vocat' New Canary) & præd' duæ Pipæ Vini (vocat' Old Canary) & præd' un' dolium (Anglicè Butt) Vini (vocat' New Sherrey) & præd' tres dolij (Anglicè Hogheads) (voc' Galliack) sunt parcell' Vinorum in Narr' præd' mentionat' Quodq; bona præd' in Inquisic' præd' menc' Virtute ejusdam brevis dicti domini Regis de vendicon' exponas è Cur' Scaccarij prædict' emanat' super Extent' prædict' per Vic' Civitat' præd' vendit' & barganizat' fuer' p Centum & sexagint' libræ & denar' ill' præd' Richardo Holder solut' & deliberat' per Vic' præd' put p breve prædict' & retorn' inde in evidenc' hic ostens' constat & apparet Et Jur' præd' ulterius sup' Sac' suum dicunt quod super quandam Peticon' domino Magno Cancellar' Angl' exhibit' & Jur' prædict' modo hic in evidenc' ostens' quedam Commissio Bankrupcon' sub Magno Sigillo Angl' postea ac antequam aliqua venditio bonor' & catall' prædict' vel alicujus inde parcell' fact' fuit vel aliqua levatio debiti domini nostri Regis super processum Scaccarii præd' habit' fuit scilicet quinto die Maij anno secundo supradict' versus ipsum Johannem Toplady obtent' & psecut' fuit ad Sectam creditor' præd' Johannis Toplady debita Jur' forma & secundum formam & effect' Statutor' contra Decoctores (Anglicè Bankrupts) Anthonio Upton Willielmo Hall Armig' Mathæo Petley Johanni Smith & Johanni Cole gen' direct' p quam quidem Commission' dictus dominus Rex nominavit assignavit & constituit ipsos Special' Commissionar' duos five quatuor vel tribus eor' quorum præd' Anthonius Upton vel Willielmus Hall foret unus plen' & sufficien' autoritat' facere & exequi omnia & singula de & concernen' prædict' Johanne Toplady & creditoribus suis secundum formam & effectum Statut' prædict' vel eorum alicujus put per Commission' præd' plenius liquet & apparet Et Jur' prædict' super Sac' suum præd' ulterius dicunt quod præd' Johannes Toplady præd' tempore quo ipse ut præfertur devenit Decoctor ac postea fuit possessionat' de prædict' Vinis bon' & catall' in Narr' prædict' menconat' ut de bon' suis ppr' quodque præd' Willielmus Hall Mathæus Petley & Johannes Smith postea scilicet tertio die Junij anno secundo supradict' ut Commissionar' & in prosecucion' Commission' præd' & Statut' præd' per Indentur' suam Jur' præd' in evidenc' monstrat' barginazaver' vendider' ordinaver' & assignaver' præd' Nicholao Lechmere & Sabian' Coles ad tunc duobus

duobus creditoribus præd' Johannis Toplady omnia & singula vina bona & catalla in Narr' præd' mentionat' habend' tenend' & recuperand' in fiducia pro usu & beneficio proprio prædict' Nicholai & Sabian' Coles & tal' al' creditor' prædict' Johannis Toplady qual' adtunc præantea advenissent vel postea in debito tempore veniant ad querend' relevium secundum formam & effectum Statut' præd' Virtute cujus ipsi præd' Nicholaus Lechmere & Sabian' Coles possessionat' fuerint put lex postulat de vinis bon' & catall' in Narr' præd' mentionat' Sed utrum super tota materia in forma præd' compert' videretur Cur' dicti domini Regis coram ipso nuper Rege quod præd' Benjaminus Thomas Alicia & Georgius fuer' culpabil' aut eorum aliquis fuit culpabil' de transgr' infrascript' modo & forma put præd' Nicholaus & Sabian' interius inde versus eisdem Benjaminum Thomam Aliciam & Georgium Querebantur Necne Jur' præd' dixer' quod penitus ignorabant & inde pet' advisament' Cur' dicti domini Regis coram ipso nuper Rege & si super tota materia præd' per Jur' præd' in forma præd' compert' videretur Cur' dicti domini Regis coram ipso nuper Rege quod præd' Benjaminus Thomas Alicia & Georgius fuer' culpabil' modo & forma put præd' Nicholaus & Sabian' interius inde versus eisdem Benjaminum Thomam Aliciam & Georgium querebantur tunc Jur' ill' dixer' super Sacram' suum præd' quod præd' Benjaminus Thomas Alicia & Georgius fuer' culpabil' de transgr' præd' modo & forma put præd' Nicholaus & Sabian' interius inde versus eisdem Benjaminum Thomam Aliciam & Georgium querebantur tunc assidebant dampnum ipsorum Nicholai & Sabian' occasione inde ultra mis' & custag' sua p ipsos circa Sextam suam in hac parte apposit' ad quadringent' & tresdecim librar' Et p mis' & custag' ill' ad quinquagint' tres solid' & quatuor denar' Sed si super tota materia præd' per Jur' præd' in forma præd' compert' videretur Cur' dicti domini Regis coram ipso Rege quod præd' Benjaminus Thomas Alicia & Georgius non fuer' culpabil' de Transgr' præd' tunc Jur' præd' dixer' super Sacrum' suum præd' quod præd' Benjaminus Thomas Alicia & Georgius non fuer' culpabil' de Transgr' ill' modo & forma prout ipsi præd' Benjaminus Thomas Alicia & Georgius interius pro se placitando allegaver' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss' reddend' nondum advisatur dies inde dat' fuit partibus præd' coram domino Rege apud Westm' usque diem Veneris prox' post Crastin' Sancti Trinitat' de Judicio suo inde audiend' eo quod Cur' dicti domini Regis hic inde nondum, &c. Ad quem diem coram domino Rege apud Westm' ven' partes præd' p Attorn' suos præd' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss' reddend' nondum advisatur dies inde dat' fuit partibus præd' coram domino Rege apud Westm' usque diem Lunæ prox' post tres Septiman' Sancti Michaelis de Judicio suo inde audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum, &c. Ad quem diem coram domino Rege

The Assignees
possess.

Et utrum super
tota materia
the Defendant
are guilty or
no, the Jurors
know not.

If the Court
shall adjudge
them guilty,
they find for
the Plaintiff.

If not, for the
Defendants.

Continuances.

Further Con-
tinuances.

Further Continuance.

Rege apud Westm' ven' partes præd' p Attorn' suos præd' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisabatur dies inde dat' fuit partibus prædict' coram domino Rege apud Westm' usque diem Lunæ prox' post Octab' sancti Hillar' de Judicio suo inde audiend' eo quod Cur' dicti

Further Continuance.

domini Regis nunc hic inde nondum, &c. Ad quem diem coram domino Rege apud Westm' ven' partes præd' p Attorn' suos præd' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend. nondum advisabatur dies inde dat' fuit partibus præd' coram domino Rege apud Westm' usque diem Mercur' prox' post Quinden' Paschæ de Judicio suo de & super præmiss. audiend' eo quod Cur' dicti domini Regis nunc hinc inde nondum, &c. Ad

Further Continuance.

quem diem coram domino Rege apud Westm' ven' partes præd' per Attorn' suos præd' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisabatur dies inde dat' fuit partibus præd' coram domino Rege apud Westm' usque diem Veneris prox' post Crastin' Sanctæ Trinitat' de Judicio suo inde audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum, &c.

Further Continuance.

Ad quem diem coram domino Rege apud Westm' ven' partes præd' per Attorn' suos præd' Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisabatur dies inde dat' fuit partibus præd' coram domino Rege apud Westm' usque diem Martis prox' post tres Septiman' sancti Mich' de Judicio suo inde audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum, &c. Ad quem diem coram domino Rege apud Westm. ven.

Further Continuance.

partes prædict' per Attorn' suos præd. Sed quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisabatur dies inde dat' fuit partibus prædict' coram domino Rege apud Westm' usque diem Mercur' prox' post Octab' sancti Hillar' de Judicio suo inde audiend' eo quod Cur' dicti dom' Regis nunc hic inde nondum, &c. Postea scilicet à die Paschæ in quindecim dies extunc prox' sequen' usque quem diem Record' & Process. præd' (antea remanen' sine die) Virtute cujusdam Actus Parliam' confect' apud Westm' decimo tertio die Februar' anno regni domini

The *Loguella* remaining, *sine die* was revived and continued by Act of Parliament.

Willielmi & dominæ Mariæ nunc Regis & Regin' Angl. &c. primo re vivificat' continuat' & ordinat' fuer' coram eisdem domino Rege & domina Regin' apud Westm' ven' partes præd' per Attorn' suos præd.

Further Continuance.

Sed quia Cur' dict' domini Regis & dominæ Regin' nunc hic de Judicio suo de & super præmiss. reddend' nondum advisabatur dies inde dat' fuit partibus præd' coram domino Rege & dominæ Regin' apud Westm' usque diem Veneris prox' post Crastin' sanctæ Trinitatis de Judicio suo inde audiend' eo quod Cur' dict' domini Regis

Judgment for the Defendants.

& dominæ Regin' nunc hic inde nondum, &c. Ad quem diem coram domino Rege & domina Regin' apud Westm' ven' partes prædict' per Attorn' suos prædict. Super quo Vis. & per Cur' dicti dom' Regis

&c

& dominæ Regin' nunc ibidem plenius intellectis omnibus & singulis præmissis maturaque deliberacon' inde habita videbatur Cur' dict' domini Regis & dominæ Regn' nunc ibidem quod præd' Benjaminus Thomas Alicia & Georgius non fuer' culpabil' de Transgr' prædict' modo & forma prout prædict' Benjaminus Thomas Alicia & Georgius pro se placitando allegaver' Ideo conf. fuit quod prædict' Nicholaus & Sabian' nil' caperent per billam suam prædict' Sed quod ipsi pro falso clamore suo forent inde in misericordia, &c. Et prædict' Benjaminus Thomas Alicia & Georgius irent inde sine die, &c. Et ulterius conf. fuit quod præd' Benjaminus Thomas Alicia & Georgius recuperarent versus prædict' Nicholaum & Sabian' septemdecim libr' pro mis. & custag' suis per ipsos circa desencon' suam in hac parte sustent' eisdem Benjaminus Thomæ Aliciæ & Georgio Juxta formam Statut' per Cur' dict' domini Regis & dominæ Regin' nunc ibidem ex assensu suo adjudicat' Et quod prædict' Benjaminus Thomas Alicia & Georgius habeernt inde Execucon', &c. prout per Record' & Process. inde in Cur' dict' domini Regis & dominæ Regin' nunc coram ipsis Rege & Regin' apud Westm' prædict' residen' plenius apparet quod quidem record' in pleno robore & vigore suis adhuc remanet minime reversat seu anihilat' Et iidem Benjaminus Thomas Alicia & Georgius ulterius dicunt quod bon' & catall' in billa & record' prædict' per ipsos Nicholaum & Sabian' versus præd' Benjaminum Thomam Aliciam & Georgium in Cur' dicti domini nuper Regis coram ipso nuper Rege ut præfertur exhibit' in accon' Transgr' prædict' menconat' Et prædict' bon' & catall' superius hic recitat' & menconat' ad manus prædict' Benjamin' Thomæ Aliciæ & Georgii & conversio in Narr' prædict' Nicholai & Sabian' hic menconat' unde versus eos inde narraver' sunt un' & eadem & non alia neque diversa quodque dispositio bon' & catall' in accon' Transgr' prædict' menconat' & concessio præd' bon' & catall' præd' hic superius recitat' sunt un' & eadem captio asportatio adventio dispositio & conversio & non alia neque diversa causa accon' Unde ipsi prædict' Nicholaus & Sabian' versus ipsos Benjaminum Thomam Aliciam & Georgium quoad præd' parcell' bon' & catall' hic superius menconat' modo narraver' Et causa accon' unde ipsi præd' Nicholaus & Sabian' in Narr' sua in accon' Transgr' præd' superius recitat' narraver' est un' & eadem & non alia neque diversa quodque Nicholaus & Sabian' quer' in accon' Transgr' in billa & record' prædict' nominat' & præd' Nicholaus & Sabian' modo quer' sunt un' & eadem personæ & non aliæ neque diversæ quodque præd' Benjaminus Thomas Alicia & Georgius quatuor defend' in accon' Transgr' præd' menconat' & præd' Benjaminus Thomas Alicia & Georgius modo defend' sunt un' & eadem personæ & non aliæ neque diversæ Et hoc parat' sunt verificare unde petunt Judicium si præd' Nicholaus & Sabian' accon' suam præd' versus eos habere seu manutenere debeant, &c. Et quoad resid' Transgr' convercon' & disposicon' resid' bon' catall' & pecun' in Narr'

*Quod nil Cap'
per Billam.*

Sine die.

*Execution
adjudged.*

*Averment that
the Judgment
is in force.*

*Averment that
the Goods in
the Action of
Trespas, and
in this of
Trove, are the
same.*

*Averment as
to the Con-
version.*

*That the Cause
of Action was
the same in
both.*

*Averment, that
the Plaintiffs
Defendants are
the same.*

*The Conclusion
of the first
Plea.*

Not Guilty to
the residue of
the Goods.

Narr' prædict' superius menconat' iidem Alicia Thomas Benjaminus & Georgius dicunt quod ipsi non sunt inde culpabil'. Et de hoc pon' se super Patriam Et prædict' Nicholaus & Sabian' similiter, &c.

Creswell Levinz.

Demurrer.

Et prædict' Nicholaus & Sabian' dicunt quod ipsi per aliqua per prædict' Aliciam Benjaminum Thomam & Georgium modo & forma superius placitand' allegat' ab accon' sua præd' inde versus eos habend' præcludi non debent quia dicunt quod placitum prædict' per ipsos Aliciam Benjaminum Thomam & Georgium modo & forma præd. superius placitat' materiaque in eodem content' minus sufficien' in lege exist' ad ipsos Nich' & Sabian' ab accone sua præd' inde versus ipsos Aliciam Benjaminum Thomam & Georgium habend' præcludend' ad quod quidem placitum ipsorum Aliciæ Benjamini Thomæ & Georgii iidem Nicholaus & Sabian' necesse non habent nec per legem terræ tenentur respondere Et hoc parat' sunt verificare Unde pro defect' sufficien' respons. ipsorum Aliciæ Benjamini Thomæ & Georgii in hac parte iidem Nicholaus & Sabian' petunt Judicium & dampnum sua occone convercon' & disposicon' bon' & catall' ill' sibi adjudicari, &c.

Joynder in
Demurrer.

Et prædict' Alicia Benjaminus Thomas & Georgius dicunt quod placitum præd' ipsorum Aliciæ Benjamini Thomæ & Georgii modo & forma præd' superius placitat' materiaque in eodem content bon' & sufficien' in lege exist' ad ipsos Nicholaum & Sabian' ab accon' sua præd' versus ipsos Aliciam Benjaminum Thomam & Georgium habend' præcludend' quod quidem placitum materiamque in eodem content' ipsi iidem Alicia Benjaminus Thomas & Georgius parat' sunt verificare Et quia prædict' Nicholaus & Sabian' ad placitum ill' non respond' nec ill' hucusque aliqualit' dedic' sed verificacon' ill' admittere omnino recusant iidem Alicia Benjaminus Thomas & Georgius (ut prius) petunt Judicium Et quod prædict' Nicholaus & Sabian' ab accon' sua præd' inde versus eos habend' præcludentur, &c. Et quia Justic' hic se advisare volunt de & super præmiss. priusquam Judicium inde reddant dies inde dat' est tam præd' Nicholao & Sabian' quam præd' Aliciæ Benjaminino Thomæ & Georgio hic usque in Octab' Sancti Hillar' de audiend' inde Judicio suo eo quod iidem Justic' hic inde nondum, &c.

Letchmere

Letchmere versus Toplady.

IN an Action of Trover by Letchmere and Others against Alice Toplady, Sir Benjamin Thorowgood and Others, where the Plaintiffs Declared, That they were possessed de ducent' viginti & quinque libris legalis monet' Angl' in pecuniis numerat', and of ten pipes and fifty gallons of Canary, and of divers other things in the Declaration mentioned, which they lost, and which came afterwards to the possession of the Defendants, and they converted them to their own use.

The Defendants, as to divers of the Goods in the Declaration mentioned (which they particularly recite in their Plea) plead in Bar, That in Michaelmas Term, in the second year of the late King James the Second, the said Plaintiff commenced an Action against the now Defendants in the Kings Bench, de placito Transgr' super Casum; where they Declared, that the Defendants Vi & armis took the said Goods and Chattels in the Declaration now mentioned and pleaded to, apud London, &c. ceperunt & asportaverunt. To which the Defendants pleaded Not Guilty, and went to Trial upon that Issue. Upon which the Jury found a Special Verdict, which the Defendants set forth in their Plea verbatim, together with the whole Record, in the Kings-Bench; and that upon that Special Verdict the Court gave Judgment, that the Plaintiffs nil capiant per billam, and that the Defendants irent inde sine die prout per Recordum & Process. inde in Cur' dicti domini Regis & dominæ Reginæ nunc coram ipsis Rege & Regina apud Westm' residen' plen' apparet quod quidem Recordum in plen' robore & vigore suis adhuc remanent minime revesat' seu annihilat'; and avers, that the Goods and Chattels in both Declarations were the same, and the taking, carrying away and disposing of the said Goods in the said Action of Trespas; and the coming of the said Goods to the hands of the Defendants, and the disposition and conversion thereof in this Declaration mentioned are the same, and the Cause of Action the same, &c. and as to the residue of the Goods and Chattels in the now Declaration mentioned the Defendant pleads Not Guilty, and Issue thereupon; and to the Bar pleaded, the Plaintiffs demurred.

It was Argued by Serjeant Tremayne against the Bar, That the Actions were of a different nature, and that in many Cases Trover would ly where Trespas Vi & armis would not, 1 Cro. 667. Ferrars and Arden; where 'tis said, If one deliver Goods to another to keep and brings Trespas, and is Barred, he may after bring Detinue; because he mistook his Action, Vid. 6 Co. 7. And he rested upon the Case of Putt and Royston, Pasch. 34 Car. 2. B. R. Rot. 422.

where, in an Action of Trespas upon a Not guilty, Verdict was for the Defendant and Judgment; and there the Plaintiff brought an Action of Trover for the same matter, and the former Judgment was pleaded in Bar, and upon a Demurrer it was adjudged for the Plaintiff.

Serjeant Pemberton contra. 'Tis taken for a Rule in Sparrie's Case, 5 Co. 61. Nemo his vexari debet si constet Cur' quod sit pro una & eadem causa. He agreed, that Trover would lye in many cases where Trespas would not; but here it appears to the Court, by the Matter disclosed in the pleading, (the Special Verdict and whole Record being set forth) that the Plaintiff was barred before, not for having mistaken his Action, but upon the Rights and Merits of the Cause, and this (he said) differed this Case from that of Putt and Royston; (Note, That Case was Adjudged when Sir Francis Pemberton was Chief Justice of the Kings-Bench) for there the Verdict being upon the General Issue in Trespas, it could not appear upon the Record, but that the Verdict was against the Plaintiff upon the mistake of the Action; whereas here it appears, upon the Matter at large set forth in the Special Verdict, that Judgment was given against the Plaintiffs upon the Merits of the Cause.

And the Court were of Opinion, that the Plea in Bar was good in this Case; but they took the Case of Putt and Royston to be a Case of the same nature. For tho' the Issue were General, yet in regard of the Averments which in every such Plea there must be, it appears to the Court that the Matter was the same, as well as here it doth upon the Special Verdict; and if it were not the same, so that the Plaintiff was barred to the former by mistaking the Nature of his Action, the Averment might be traversed: Therefore by reason of that Case Adjudged and the Importunity of the Plaintiffs, Leave was given by the Court to speak further to the Case the next Term.

The Earl of Mountague *versus* The Lord Preston.

In an Action on the Case, for the Profits of the Office of Master of the King's Wardrobe, the Plaintiff Declared, That King Charles the Second, in the 23th year of his Reign, granted him a Patent to hold the said Office for Life, reciting a former Grant thereof to the Earl of Sandwich, and the Surrender of that Grant. And that the Defendant by colour of a Patent granted to him in the first year of the late King James had entred upon the Office, and taken the Profits, and had deprived the Plaintiff of the whole benefit and profit of the Office.

Upon

Upon Not guilty pleaded, it came to a Trial at the Bar this Term, and it was insisted upon for the Defendant, That the Plaintiffs Patent having recited a former Grant, that they must prove that Grant to have been surrendered.

To which it was Answered, That if they took advantage of the Recital, they must admit all that was recited, as well the Surrender as the Grant. And of that Opinion was the Court.

Then the Defendant produced the Earl of Sandwich's Patent; and this the Court held would put the Plaintiff to prove a Surrender: And a Surrender was shewn in Evidence accordingly.

Note, It was said in an Action of this Nature, that it is not necessary to shew every particular Sum received by the Defendant: But it is a good Evidence for the Damage, to shew the Profit of the Office communibus annis.

Anonymus.

After an Extent upon a Statute, and a Liberate out of this Court, the Writ was Habere fac' terr' & tenementa, instead of Liberari facias; and it was moved to amend the word Habere in the Writ and to make it Liberari.

And after divers Motions the Court Ordered the Amendment to be accordingly; because it is a Judicial Writ. 8 Co. 157. a. 1 Cro. 709. A Writ of Enquiry was awarded to the Sheriffs of London, and it was quod Inquirat instead of Inquirant, and it was amended. Vid. the Case of Walker and Riches, 3 Cro. 162. and the Case of Keer and Guyn, Hob. 90. but in that Case the Roll was wrong in a very material thing; for it was not said in the Elegit, the Lands and Tenements of the Defendant.

Anonymus.

An Action of Debt was brought in this Court, for a Sum of Money recovered in the Hundred Court; and the Defendant was admitted to wage his Law, tho' at first the Court doubted. Vid. Mo. 276. for a Wager of Law to an Action of Debt, brought for an Amercement in a Court Baron.

Note, When the Defendant hath his Hand upon the Book, before he is sworn, the Plaintiff is to be called, and he may be Non-suited.

The Defendant is to bring his Computators; but they may be less than Eleven, and they are sworn de credulitate.

Anonymus.

An Action was brought for speaking of these words of the Plaintiff, He broke my House, like a Thief. And upon Not guilty pleaded, a Verdict was found for the Plaintiff. And the Court held the words not to be actionable.

Anonymus.

In an Action for Words spoken of the Plaintiff in saying; He was a Clipper and Coiner.

After Verdict, upon Not guilty pleaded, it was moved in Arrest of Judgment, that the Words did not charge him with Clipping and Coining of Money; and Clipping and Coining might be apply'd to many other things.

But the Court held the Words to be actionable in regard of the strong Intendment; and such Words are understood, by those that heard them, to mean Clipping and Coining of Money.

Anonymus.

An Attorney brought an Action, for that the Defendant said of him, He is a Cheating Knave, and not fit to be an Attorney.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that there was no Communication of his Profession, and the Words did not necessarily relate to his Practice.

But the Court held the Action would lie: for saying, That he was not fit to be an Attorney, shewed plainly, that Cheating Knave had reference to that.

Anonymus.

Anonymus.

UPon a Motion for a New Trial it appeared, that the Solicitor for the Plaintiff (who also was an Attorney) had wrote two Letters to two of the Jury before the Trial, importuning them to Appear, and setting forth the Hardships that his Client had suffered in the Cause, and how he had Verdicts for his Title.

The Court set aside the Trial for this Cause, and Committed the Solicitor to the Fleet for this Misemeanor, being Embzacing of a Jury; and before his Discharge, made him pay Ten pounds to the party towards the Charges of the Trial.

Precious *versus* Robinson.

The Cause being at Issue in Hillary Term last, a Venire was awarded, and a Jury Returned upon it; and in Easter Term after another Venire was awarded, and a Trial was by a Jury Returned upon the two Venire's.

Upon this the Court set aside the Verdict; for there was no Authority for the two Venire's, so all the Proceedings thereupon are void, and not aided by the Statute of 16 Car.2.

Cooke *versus* Romney.

An Action of Covenant was brought against two, and it was quod teneat conventionem instead of teneant; and after a writ of Error brought it was moved, that it might be amended and made teneant.

It was Objected, That false Latin in an Original could not be amended, as hos breve for hoc breve; so in Waste, destructionem for destructionem, Blackmore's Case, 8 Co.

But the Court granted the Motion, and ordered the Amendment. And it was said, of late days it had been done in case of a word Mistaken in an Original; as in Ejectment, divisit for dimisit. Vid. in Blackmore's Case the like, 159.b. Imaginavit for imaginatus est, was amended.

Anonymus.

Anonymus.

In Trover and Conversion for a Mare.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Mare was laid ad valentiam, and it should have been pretii.

Sed non allocatur. After Verdict (2 Cro. 307. Styl. 174, 182. 2.) the Plaintiff declares, that he was possessed de quadam equa ut de catallis suis propriis, and that catalla prædict' casualiter perdidit, and that coming to the Defendants hands, he converted catalla prædict' to his own use, so that there is no express Conversion of the Mare.

The Court said, That the Declaration was Inartificial, but good after a Verdict; for catalla prædict' must refer to the Mare, for nothing else is mentioned before.

Tunstall *versus* Brend.

In an Ejectment, upon Not guilty a Special Verdict was found, upon which there arose several Points of Law; but it was moved for the Defendant, that the Declaration was of Michaelmas Term 2 Jac. 2. and the Demise is laid to be 30 Octob. 2 Jac. and so after that Term began.

Note, The Declaration recited an Original, and an Original was produced Teste 2 Novembris, which was after the Demise. And the Prothonotary informed the Court, that this was frequently allowed, and that no Memorandum of the Originals, bearing Teste within the Term, was used to be made upon the Record.

Highway *versus* Derby.

In an Action of Trespass, Quare clausum fregit, & solum, & fundum, (viz.) duas acras terr' fod' subvert' & asportavit.

Upon Not guilty pleaded, and Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Declaration was insufficient as to the digging and carrying away of the Soyl; for duas acras terr' doth not express the quantity of Earth, but the measure and extent of the Ground where the digging was.

And for this Cause the Judgment was stayed, by the Opinion of the whole Court.

Note,

Note, If the Sheriff Return a Rescous, it is not traversable; but an Attachment goes against the Rescousers, and a Fine usually set. Tho' it appears by Dyer, such Return was allowed to be traversed in C.B. but not practised of late.

Termino Sanctæ Trinitatis, Anno 2 *W. & M.*

In Communi Banco.

Sherborn *versus* Colebach.

IN an Indebitar' assumpsit for 20 l. lost by the Defendant, to the Plaintiff at a certain Play, called Hazard.

Upon Non assumpsit, after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that to Play at Dice is an unlawful Game, and so the Consideration is insufficient.

But to that the Court said, that they could not intend that this was Play at Dice, tho' there is a Play called Hazard at Dice, known amongst Gamesters; neither is Play at Dice in it self unlawful, tho' prohibited by several Statutes to certain persons, and to be used in certain places.

Then it was moved, that the Declaration was too General; for tho' there have been divers Actions maintained for Money won at Play, yet they use to declare, that in Consideration the Plaintiff promised, That if the Game went on the Defendants side, he would pay so much to the Defendant; the Defendant promised, That if it went on the Plaintiffs side, to pay so much to him.

But the Court said, that of late it had been the usage to declare Generally, and it might be as well as an Indebitatus pro opere & labore. And Judgment was given for the Plaintiff.

Note, Justice Powell, cited in the Case supra the Lord North's Case, 2 Leon. 179. where Queen Elizabeth had granted the Fines to him and his Heirs, pro licentia concordandi, within a certain place; and he brought an Indebitar' assumpsit for such Fine; and it was held, that it would lye.

And also a Case adjudged in the Kings Bench the last Term, that an Indebitar' assumpsit would lye for a Dropping Fine, in one Shurtleworth's Case.

Pyne *versus* Woolland.

Debt for Rent
against an
Executor, upon
a Lease parol.

Demise to the
Testator.

Quarta pars
molendini, &c.

Habund.

Pro uno anno,
Et sic de anno
in annum.

The Rent
payable
Monthly.

Rent unpaid.
Accio accrevit.

Another De-
mise at Will
laid.
De quarta
pars molendini
Fullonici.
Habund.

Civit' Exon' **T**homasina Woolland nuper de Civitat' Exon' in Com' Civitat' Exon' Vid' **E**xecutrix testament' Isaaci Woolland sum' fuit ad respondend' Mariæ Pyne Vid' de plaito quod reddat ei octoginta & sex libras duos solid' un' denar' & un' obulum quos ei injuste detinet &c. Et unde eadem Maria p Nathanielem Salter Attorn' suum die' quod cum prædicta Maria decimo die Maij Anno Domini Millesimo sexcentesimo octogesimo tertio apud Civitat' Exon' prædict' in Com' ejusdem Civitat' dimississet præfat' Isaaco in vita sua quartam partem duorum molendinorum granaticorum & unius molendini brasiatorij (sub uno tecto Anglicè Roof) vocat' sive cognit' per nomen de Cuckingsfool-Whills scituat' jacen' & existen' in Exland in Paroch' sancti Edmundi in Com' Civit' Exon' prædict' ac quartam partem domus molendin' sive tenementi cum pertin' adinde prox' jacen' ex boreali latere eorundem necnon quartam partem medietatis pasturæ unius parcell' terræ pone dicta molendina not' sive cognit' per nomen de Bonhay eisdem molendinis pertin' sive pertinen' habend' & occupand' eidem Isaaco à primo die ejusdem mensis Maij usque finem & terminum unius anni integri extunc prox' sequen' & plenar' complend' & finlend' & sic de anno in annum quamdiu ambabus partibus placeret reddend' & solvend' proinde eidem Mariæ ad finem cujuslibet mensis (secundum computacon' viginti & octo dierum pro quolibet mense) quo idem Isaacus eadem dimissa præmissa teneret reddit' sexaginta solidor' quatuor denar' & unius obuli legalis monet' Angl' Virtute cujus dimissionis idem Isaacus in quartas partes prædictas intravit & fuit inde possessionat' ac easdem quartas partes usque nonum diem Septembr' Anno Domini millesimo sexcentesimo octogesimo nono habuit & occupavit ac quinquaginta septem libr' septem solid' un' denar' & un' obul' (de prædictis octoginta sex libris duobus solid' un' denar' & un' obul' parcell') super eodem nono die Septembris Anno Domini millesimo sexcentesimo octogesimo nono supradicto p reddit' dimissorum præmissorum pro novemdecim mensibus secuncum computacon' prædict' adtunc finit' eidem Mariæ aretro fuer' & non solut' per quod accio accrevit eidem Mariæ ad exigend' & habend' de præfat' Isaaco in vita sua & de prædict' Thomasina post ipsius Isaaci mortem prædictos quinquaginta septem libras septem solid' un' denar' & un' obul' (de prædictis octoginta sex libris duobus solidis un' denar' & un' obul' parcell') Ac etiam cum prædicta Maria eodem decimo die Maij Anno Domini millesimo sexcentesimo octogesimo tertio apud Civit' Exon' prædict' in Com' ejusdem Civit' dimississet eidem Isaaco quartam partem duorum molendinorum Fulloniorum cum pertin' in Paroch' Sancti Edmundi prædict' habend' & occupand'

occupand' eidem Iſaaco à primo die ejuſem Maij uſque finem & ter-
 minum unius anni integri & ſie de anno in annum quamdiu ambabus
 partibus placeret Reddend' & ſolvend' eidem Mariæ pro prædicta
 quarta parte duorum moledin' Fullonicorum ill' cum pertin' durante
 tempore quo idem Iſaacus eandem quartam partem haberet & teneret
 annual' reddit' viginti librarum ad quatuor maxime uſual' Feſta ſci-
 licet ad Feſta Sancti Michaelis Arch'i Nativitat' Domini noſtri Dei
 Annunciationis beatæ Mariæ Virginis & Nativitatis Sancti Johannis
 Baptiſtæ per æquales porcones ſolvend' Virtute cujus dimiſſionis
 idem Iſaacus in eandem quartam partem ult' menconat' intravit &
 fuit inde poſſeſſionat' ac eandem quartam partem uſque nonum diem
 Septembris Anno Domini Milleſimo ſexcenteſimo nono habuit &
 occupavit ac viginti & quinque libræ (de prædict' octoginta ſex libris
 duobus ſolid' un' denar' & un' obuli al' parcell') pro reddit' prædict'
 quartæ partis ult' menconat' pro uno anno integro & un' quarter'
 unius anni finit' ad Feſtum Nativitatis ſancti Johannis Baptiſtæ Anno
 Domini milleſimo ſexcenteſimo octogefimo nono eidem Mariæ
 aretro fuer' & non ſolut' per quod acc'o accrevit eidem Mariæ ad
 exigend' & habend' de præfat' Iſaaco in vita ſua & de præfat' Tho-
 maſina poſt ipſius Iſaaci mortem prædictas viginti & quinque libras
 (de prædictis octoginta ſex libris duobus ſolid' un' denar' & un' obul'
 al' parcell') Ac etiam cum prædict' Maria eodem decimo die Maij
 Anno Domini milleſimo ſexcenteſimo octogefimo tertio apud Civit'
 Exon' prædict' in Com' ejuſdem Civit' dimiſiſſet eidem Iſaaco quar-
 tam partem unius Stabuli & novæ Structuræ ſuper veteri Stabulo in
 paroch' Sancti Edmundi prædict' Habend' & occupand' eidem Iſaaco
 à primo die ejuſdem Maij uſque finem & terminum unius anni integri
 extunc prox' ſequen'. Et ſie de anno in annum quamdiu ambabus
 partibus placeret reddend' & ſolvend' proinde eidem Mariæ duran'
 tempore quo idem Iſaacus eandem quartam partem haberet & teneret
 annual' reddit' quinquaginta ſolidorum ad quatuor maxime uſual'
 Feſta ſcilicet ad Feſta Sancti Michaelis Arch'i Nativitatis Domini
 noſtri Dei Annuciaconis Beatæ Mariæ Virginis & Nativitatis Sancti
 Johannis Baptiſtæ per æquales porcones ſolvend' Virtute cujus dimiſ-
 ſionis idem Iſaacus in eandem quartam partem ult' menconat' intravit
 & fuit inde poſſeſſionat' ac eandem quartam partem uſque nonum
 diem Septembris Anno Domini milleſimo ſexcenteſimo octogefimo
 nono habuit & occupavit ac ſexaginta duo ſolidi & ſex denar' (de
 prædict' octoginta ſex libris duobus ſolidis un' denar' & un' obul'
 al' parcel') pro reddit' prædict' quartæ partis ult' menconat' pro uno
 anno integro & uno quarter' unius anni finit' ad Feſtum Nativitatis
 Sancti Johannis Baptiſtæ Anno Domini milleſimo ſexcenteſimo octo-
 gefimo nono eidem Mariæ aretro fuer' & non ſolut' per quod acc'o
 accrevit eidem Mariæ ad exigend' & habend' de præfat' Iſaaco in
 vita ſua & de præfat' Thomasina poſt ipſius Iſaaci mortem prædict'
 ſexaginta duos ſolid' & ſex denar' (de prædict' octoginta ſex libris
 duobus .

De anno in
autum.

Entry.

Rent arrears.

Actio accrevit.

Another De-
miſe at Will
laid.

Habund.

Sur uno anno,
cre.

Reddend.

Entry and
Poſſeſſion.

Rent arrears.

Actio accrevit.

Another De-
mise at Will
laid.

Of a Treble
Mill.

Pro uno anno,
&c.
Reddend.

Ad quatuor
Festa.

Entry and
Possession.

Rent arrear.

Adio accrevit.

Testator in
vita, nor the
Executrix post
mortem, have
not paid.

The Defendant
pleads in
Abatement,
that the party
died Intestate,
and that Ad-
ministration
was granted
to her.
Died intestate.
Letters of
Administration
granted.
The Defendant
ought to be
sued as Admi-
nistratrix, and
not as Exe-
cutrix.

duobus solidis un' denar' & un' obul' al' parcel') Ac etiam cum prædict' Maria decimo die Maij Anno Domini millesimo sexcentesimo octogesimo tertio apud Civit' Exon' prædict' in Com' ejusdem Civit' dimisisset eidem Isaac' quartam partem cujusdam al' molen- dini (vocat a Treble Mill) in Paroch' Sancti Edmundi prædict' habend' & occupand' eidem Isaac' à primo die ejusdem Maij usque finem & termin' unius anni integri extunc prox' sequen' Et sic de anno in ann' quamdiu ambabus partibus placeret reddend' & solvend' eidem Mariæ pro eadem quarta parte ult' menconat' duran' tempore quo idem Isaacus eandem quartam partem haberet & teneret annual' reddit' decem solidorum ad quatuor maxime usual' Festa scilicet ad Festa Sancti Michaelis Archi Nativitatis Domini nostri Dei Annun- tiationis Beatæ Mariæ Virginis & Nativitatis Sancti Johannis Baptiste per æquales porções solvend' Virtute cujus dimissionis idem Isaacus in quartam partem ill' intravit & fuit inde possessionat' ac eandem quartam partem usque nonum diem Septembris Anno Domini mil- lesimo sexcentesimo octogesimo nono habuit & occupavit ac duo- decim solid' & sex denar' (de prædict' octoginta sex libris duobus solid' un' denar' & un' obul' resid') pro reddit' prædict' quartæ partis ult' menconat' pro uno anno integro & uno quarterio unius anni finit' ad Festum Nativitatis Sancti Johannis Baptiste Anno Domini millesimo sexcentesimo octogesimo nono eidem Mariæ aretro fuer' & non solut' per quod acco accrevit eidem Mariæ ad exigend' & habend' de præfat' Isaac' in vita sua ac de præfat' Thomasina post mortem ejusdem Isaac' prædict' duodecim solid' & sex denar' (de præd' octoginta sex libris duobus solid' un' denar' & un' obul' resid') prædict' tamen Isaacus in vita sua ac prædict' Thomasina post mor- tem ejus licet sæpius requisit' prædict' octoginta sex libras duos solidos un' denar' & un' obul' seu aliquem inde denar' eidem Mariæ nondum reddider' nec eorum alt' reddidit set ill' ei reddere omnino contradixer' ac prædicta Thomasina ill' ei reddere adhuc contradic' & injuste detinet Unde dic' quod deteriorat' est & dampnum habet ad valentiam quadraginta librarum Et inde produc' sectam &c.

Et prædicta Thomasina per Thomam Clarke Attorn' suum ven' Et dic' quod prædict' Isaacus Woolland apud Civit' Exon' prædict' obiit intestat' post cujus mortem Edwardus Lake Clericus Sacre Theologie professor' Archi Archidiacon' Exon' legitime constitut' apud Civit' Exon' prædict' per Litteras suas Administratorias commisit eidem Thomasinæ Administraconem omnium bonorum & catallo- rum quæ fuer' prædict' Isaac' tempore mortis suæ qui quidem Edwardus adtunc habuit plenam Authoritatem ad Administraconem illam in ea parte committend' in quo casu præd' Maria ipsam Thoma- sinam Administratricem bonorum & catallorum quæ fuer' prædict' Isaac' & non Executricem Testamenti ipsius Isaac' in brevi suo prædict' nominare debuit Et hoc parat' est verificare Unde pet' Judic' de brevi illo Et quod breve illud cassetur.

Et

Et prædicta Maria dic' quod breve suum prædict' ratione præallegat' cassari non debet. Quia dic' quod post mortem præfat' Isaac & ante commissionem Administrationis prædict' eidem Thomasinæ in forma prædicta scilicet decimo octavo die Septembris anno regni domini Regis & dominæ Reginæ nunc primo præfat' Thomasina diversa bona & catalla quæ fuer' præfat' Isaac tempore mortis suæ ut Executrix testamenti ipsius Isaac Administravit videlicet apud paroch' Sancti Edmundi prædict' Et hoc parat' est verificare Unde pet' Judicium & debitum suum prædict' unacum dampnis suis occasione detentionis debiti illius sibi adjudicari &c.

The Plaintiff Replies, That the Defendant administered as Executrix before the granting of the Administration to her.

Et prædicta Thomasina dic' quod prædict' placitum prædict' Mariæ superius replicando placitat' materiaque in eodem content' minus sufficien' in lege existunt ad acconem ipsius Mariæ prædict' versus ipsam Thomasinam habend' manutenend' quodque ipsa ad placitum ill' modo & forma prædict' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' placiti prædict' Mariæ in hac parte eadem Thomasina pet' Judicium Et quod breve ipsius Mariæ cassetur &c.

Demurrer to the Replication to the Plea in Abatement.

Et prædicta Maria dic' quod placitum prædict' per ipsam Mariam superius replicando placitat' materiaque in eodem content' bonum & sufficien' in lege existit ad actionem ipsius Mariæ versus præfat' Thomasinam habend' manutenend' quod quidem placitum materiaque in eodem content' ipsa eadem Maria parat' est verificare & probare prout Cur' &c. Et quia eadem Maria ad placitum illud non respond' nec ill' hucusque aliquant' dedie ipsa eadem Maria ut prius pet' Judicium & debitum suum prædict' unacum dampnis suis occasione detentionis debiti illius sibi adjudicari &c. Et quia Justic' hic se advisare volunt de & super præmiss' priusquam Judicium inde reddant dies dat' est partibus prædict' hucusque in Crastino Sanctæ Trinitatis de audiendis inde Judicio suo eo quod idem Justic' hic inde nondum &c.

Joynder in Demurrer.

Pyne versus Woolland.

In an Action of Debt against the Defendant, as Executrix of her Husband for Arrears of Rent due from the Testator.

The Defendant pleaded in abatement of the Writ, That after the death of her Husband, Administration of his Goods and Chattels was granted to her; and that she ought to have been named Administratrix in the Writ, and not Executrix, unde pet' Judicium de brevi & quod breve istud cassetur.

The Plaintiff Replied, That after the death of the Husband, and before the Administration committed, the Defendant administered divers Goods and Chattels of her Husbands at such a day and place, &c.

To this the Defendant Demurred, and Judgment was given for the Plaintiff. For she sets not forth the Day when Administration was committed, so it might be after the Writ brought: And besides, if she disposed of the Goods as Executrix of her own wrong, the taking of Administration afterwards, tho' before the Writ brought, will not hinder the Plaintiff from charging her as Executrix of her own wrong. And the difference is taken in the Case of *Williamson and Norwich*, Styl. Rep. 337. 1 Ro. 923. where an Action of Debt was brought upon a Contract against the Defendant, as Executor of his own wrong. The Defendant pleads the party was Indebted to him upon Bond, and died Intestate; and that he afterwards took out Letters of Administration to him (which appeared to be after the Writ brought) and pleads a Retainer for his own Debt: And the Plaintiff Demurred, and Judgment was given for the Defendant, that such Administrator might Retain for his own Debt, tho' he had been before Executor of his own wrong. But such taking of Administration should not abate the Plaintiffs Writ. *Kelw. 127. 2. Vid. 5 Co. Coulters Case*, an Executor of his own wrong cannot Retain.

Anonymus.

Trespas Quare clausum fregit, and declared of divers other Trespases.
The Defendant pleaded Not guilty as to the clausum fregit, and Justified as to the other Trespases; which upon the Issue was found for the Defendant, and as to the clausum fregit it was found for the Plaintiff.

The Court held it a clear Case within the late Statute, that the Plaintiff should have no more Costs than Damages, the Damages being under 40 s.

Alleston

Alleston versus Marsh

A Prohibition was prayed to the Court of Admiralty, to stay a Suit commenced there by some of the Mariners in a Ship against two of the Part owners, for their Wages, upon a suggestion that the Contract was made with them upon Land.

It was said, that tho' Suits had sometimes been permitted there for Mariners Wages, yet that was when they all joyned in the Suit, to avoid the putting them to Sue severally, as they must do at Law. But here there is but part of them that Sue, and then they appear to be Officers in the Ship that Sue, and so not to have this Privilege of the Common Seamen to Sue; for it was alleged, that this practice had been obtained but of late, and in favour to them; and here it appears, that the Contract for the Wages was joyned with the Owners, and they have sued but two of them, and so they shall be charged with the whole.

But the Court denied the Prohibition; for they have been ever allowed to proceed for Mariners Wages; and tho' the Plaintiffs have an employment in the Ship, as Purser, Boatwain, or the like, they are Mariners as well as others, and may sue in the Admiralty Court for their Wages, and they having Jurisdiction shall proceed in their own way, tho' different from our Law as to the joyning of all the Plaintiffs or Defendants, and if the Proceeding be not according to their Law, the Remedy lies there.

Note, It was said by one of the Admiralty, that tho' the Suit be against some of the Owners, the Court there is not to charge them with the whole, but according to their proportionable parts.

Adams versus Cross

In a Replevin against Cross and two others, for taking of divers Goods at Ware, in quodam loco vocat a Messuage there.

The Defendants made Conusance as Bayliffs of Jane Cross, and they say, that before the Caption she was seised in her Demesne as of Fee, at the Will of the Lord of the Mannor, according to the Custom of the Mannor of and in the aforesaid Messuage; which said Messuage is, and came out of mind hath been parcel of the said Mannor, and demised and demissable by Copy of Court Roll, &c. and being so seised 24 June 1687. He demised the said Messuage to the said Adams from thenceforth at Will, reserving for so long time as the said Adams should hold it, the yearly Rent of 8 l. by equal Quarterly payments: By virtue of which Demise the said Adams entered, and was, and yet is possessed;

possessed; and for 141. (being a Year and three Quarters Rent, ending at the Feast of the Nativity of St. John Baptist last past) they as Bayliffs to the said Jane distrained the said Goods, being in the House, &c.

To this Abowry the Plaintiff pleaded an insufficient and scilbous Bar, and now took Exceptions to the Avowry; for that the said Jane Cross is therein set forth to have been leased in fee of the said Messuage at the Will of the Lord, according to the Custom of the Manor, and sheweth no admission from the Lord; whereas a Copyholder cannot plead his Estate, without setting forth an Admission or Grant from the Lord, 4 Co. 22. b.

But the Court resolved in this Case, there need not be shewn any Admittance; for the Title did not come in question.

If one pleads a particular Estate for life or years generally, the commencement of it is to be shewn; but if a Lessee for years Let for a lesser Term, reserving a Rent, in an Action of Debt for the Rent, he may set forth, that at the time of the Lease he was possessed of the Land *p termino diversorum annorum adtunc & adhuc ventur*; and being so possessed, demised to the Defendant, &c. without shewing the beginning of his Term, and how derived; for tis but an inducement to the Action. And Judgment was given for the Avowant.

Clarke versus Tucket.

IN an Action of Trespas, for entering of his House and taking of four Pewter Dishes of the Plaintiffs.

The Defendant pleaded the Letters Patents of Edward the 4th, whereby the Company of Taylors in the City of Exeter were Incorporated, and by the said Letters Patents they were to keep a Feast every year, upon the Feast-day of St. John the Baptist, in some place of the City belonging to them, and there to make Orders and By-Laws, &c. And that the said Corporation, at a Meeting held the 20th of March, in the 21st year of the Reign of the late King Charles the Second, did make an Ordinance, or By-Law, That if any person (being Master, or one of the Chief Wardens of the Corporation aforelaid) at any of their Assemblies, should reproach or revile the Master, or any of his Brethren, or any of the Common Council of the Corporation, he should forfeit 6 s. and 8 d. And if any other person or persons of the said Bodies should revile or use any unhandsom Speech of the Master, Wardens, or any of the said Council, he should forfeit 3 s. and 4 d. the said Fines to be levied by Distress upon a Warrant under the Corporation Seal, and by sale of the Offenders Goods, after Four days Notice given of the Fine so set forth, and an Allowance of the By-Law by the Justices of Assize, according to the Statute of Henry the 7th.

And

And further saith, That the Plaintiff being a Member of the said Corporation, and having Notice of the said By-Law, did at an Assembly of the said Master and Wardens in the Common Hall, say of the said Master and Wardens in the said Corporation these words, (viz.) The Masters (*ipso Magistrum & Custod' innuendo*) are all a Company of Pickpocket Rogues; and divers other very scurrilous and reproachful Words were set forth to have been there spoken of the said Master and Wardens by the Plaintiff, whereby the Plaintiff forfeited 3 s. and 4 d. by the said By-Law; which was demanded of him, and by him neglected to be paid by the space of six Days. Whereupon the said Master made his Warrant, directed to the Defendant, commanding him to Levy the said 3 s. and 4 d. by distress and sale of the Goods of the Plaintiff. And the Defendant (by virtue of the said Warrant) did enter into the Plaintiffs House (being then open) and took the Goods in the Declaration mentioned, *Nomine districtionis prout ei bene licuit*. And to this Plea the Plaintiff demurred, and Judgment was given for the Plaintiff.

For a Corporation cannot make a By-Law to have a Forfeiture levied by the sale of Goods, 8 Co. 127. nor for forfeiture of Goods: And here, tho' the Defendant only Distrained, neither is the Defendant charged with selling the Goods in the Declaration; yet the By-Law being void as to the selling, is void in toto, and no Justification can be upon it.

It was also said at the Bar, That the Distress was excessive, to distrain so many Dishes for 3 s. and 4 d. Indeed a man cannot sever a Distress, and therefore in some cases a Distress of great value, as a Cart and Horses, may be taken for a small matter, because not severable; but here he might have taken some of the Dishes.

But the Court did not regard that Exception, because it did not appear of what value the Dishes were.

Again it was said, That they ought to have made the By-Law upon St. John Baptists Day. To which it was answered, That they were not tyed to the Time, but the Place; it was *ibidem facere Ordinationes*, and not *ad tunc & ibidem*.

But the Court gave Judgment upon the first Matter.

Newport versus Godfrey.

The Plaintiff brought an Action of Debt in the Detinet against Godfrey, Executor of Stephen Turner for 70 l. arrears of Rent, and declared upon several Demises upon the 28th of September 1685. to the said Turner, reserving several Rents, of which there became arrears to the Plaintiff, in the Life time of the said Turner, 70 l. and it appeared by the Declaration that the Leases ended in the Life of the said Turner.

In Bar of which the Defendant pleaded several Bonds entered into by the Testator, to divers persons, for the payment of Money, which he avers to be all for true and just Debts, and that he had administered all, besides Goods, to the value of 40 l. which he retained towards satisfaction of the said Bonds, &c.

To which the Plaintiff demurred, and it was Argued last Term for the Defendant, that a Debt upon a Specialty was to be preferred before Debt for Rent upon a Lease parol, Styl. Rep. 61. Rolls said, that a Specialty was of an higher nature, than Rent reserved upon a Lease by Deed. Indeed it is made a Quere in Roll. Abr. 1. part 927. but if Rent should be preferred where the Lease was continuing after the Death of the Testator, in regard the Testator's Goods are liable to be distrained for it, which the Executor cannot withstand. Yet there is not the like Reason when the Lease expires in the Life of the Testator; and the Case was adjourned to this Term for the Judgment of the Court.

And the whole Court were of Opinion, that Judgment should be for the Plaintiff. For tho' the Lease be determined, yet the Debt still labours of the Realty, and is maintained in regard of the Profits of the Land received; insomuch that no Mager of Law lies in Debt for Rent, tho' brought after the Lease determined, A Bond given for Rent will not drown it, 11 H. 4. 75. b. an Action lies against the Executors of an Assignee of a Lease for Rent in the Testator's time, and yet the Assignee is chargable only in respect of the Lease. Vid. 13 H. 4. 1. a. Office of Executors 209, 210, 211, &c.

Godfrey *versus* Ward.

In an Action of Debt for Rent.

The Defendant pleaded the Statute of Limitations, and that *Causa Actionis prædictæ, &c. accrevit* above six years before the Writ brought.

To this the Defendant demurred, and the Cause of the Demurrer was upon the late Statute for reviving of Process, anno primo Willielmi & Mariæ, by which it is provided, in regard there was an Interruption of the Government and proceedings of Law, from the 11th of September 1688. to the 13th of February following, that the time within those Days should not be accounted as any part of the six years to bar an Action by the Statute of Limitations, or of the six Months for bringing a *Quare Impedit, &c.* so as it was urged, that the Defendant should have shewn, that six Years and so many Days were elapsed as ate between the 11th of December and the 13th of February. For tho' six years may be passed, yet the Plaintiff may be within time by reason of the said Statute.

But the Court were of Opinion; that the Defendants Plea was well; and this should be shewn of the Plaintiffs part; for the Statute does not alter the form of Pleading, but that shall be as it was before; and the Plaintiff (if the Matter will bear it) is to help himself upon the said Statute.

The old way upon the Statute of Limitations was, for the Defendant to plead the Statute at large; but of late years, the General Pleading of *Non assumpsit infra sex annos* has been allowed.

Warren *versus* Sainthill.

Devon. **S**AMUEL SAINTHILL nuper de Bradmuch

in Com' prædict' Armig' & Johannes Savery nuper de Bradmuch in Com' prædict' Husbandman attach' fuer' ad respondend' Thomæ Warren gen' de placito Transgr' super Casum &c. Et unde idem Thomas per Johannem Prowse Attorn' suum Queritur quod cum prædict' Thomas vicesimo nono die Septembris anno regni domini Regis & domine Regine nunc primo & continuè postea usque primum diem Januarii tunc p' sequen' fuit possessionar' & inhabitans de & in quodam antiquo Mesuagio scituat' & jacen' in villa de Watterstasse infra paroch' de Bradmuch prædict' ac p' totum tempus ill' quandam viam pedestrem ducent' à Villa de Watterstasse prædict' in per & trans quædam Clausâ (voc' Crollands Smiths Down and Culver Park) infra paroch' de Bradmuch prædict'

Case for stopping up of a Foot way.

The Plaintiff says, That was possess he and inhab of, in an ancient Mesuage. And that he has & hasing depriv a Foot-way for himself, and his Servants.

As belonging
to his Mesu-
age.

The Defen-
dant, to disturb
him in the
Way, dug
Ditches and
Trenches
cross the Way.
And erected
Hedges and
Fences cross it.
Whereby he
was hindered of
his Way.

prædict' usque ad villam de Bradmuch in Bradmuch prædict' pro
se & servientibus suis ad eundem & redeund' omnibus temporibus
ad libitum ejus tanquam ad Mesuag' prædict' spectant' & pertinen'
habuit & de jure habere debuit prædicti Samuel' & Johannes ma-
chinan' & intenden' ipsum Thomam minus rite perturbare & ipsum
de via præd' impedire & deprivare prædict' vicesimo nono die Sept'
Anno primo supradicto apud paroch' de Bradmuch quadam Fossa
& Trenches ex transverso via prædict' int' Villas de Watterstasse
& Bradmuch prædict' fodier' & fecer' ac etiam viam ill' ibidem cum
quibusdam sepibus & sensuris ex transverso via prædict' ejeck'
obstruxer' & præcluser' per quod idem Thomas à via prædict' in
forma prædict' habend' à prædict' vicesimo nono die Septembris
usque præd' primum diem Januarii Anno primo supradicto penitus
impediri & deprivat' fuit ad dampnum ipsius Thomæ quadragint'
librar'. Et inde p'cedit sectam, &c.

To this the Defendant pleaded a frivolous Plea, and the
Plaintiff demurred; and the Defendant joyned in the Demurrer,
and Judgment was given for the Plaintiff.

Warren versus Saintchill.

In an Action upon the Case for Stopping of a Way, the Plaintiff
declared, that he was possessed, and an Inhabitant of and in a
certain ancient Messuage the 29th of Sept. in the first year of the now
King and Queen, and so continued to the first day of January
then next following; and for all that time had a Foot-way over
the Defendant's Ground, tanquam ad Mesuag' præd' spectant' &
pertinent' & de jure habere debet, and that the Defendant stopped it
up ad dampnum, &c.

The Defendant pleaded a frivolous Plea, to which there was a
Demurrer.

It was Objected on the Defendant's part, that the Declaration
was insufficient, because the Plaintiff did not prescribe for the
Way, nor otherwise entitle himself to it, than by a possession of
the Messuage, and that he had and ought to have a Way to the
said Messuage belonging. And a difference was taken between this
and Dent and Oliver's Case, 2 Cro. 43. where one alleged himself
to be seised in fee of a Mannor, and had a Fair there, and that the
Defendant disturbed him to take Toll. And in 2 Cro. Stackman and
West, there is a Prescription laid in the Dean and Chapter (who
had the fee) for the Way: But it was Objected, That a Corpora-
tion could not prescribe in a Quo Estate; but it was held well,
being but inducement to the Action.

And

And the Court here held the Declaration sufficient, being but a possessory Action. And a Case was said to be so Adjudged in this Court between the same parties Anno primo Jacobi secundi. Vide the Case of Saint John and Moody upon the like Point.

Woodward & al' *versus* Fox.

In an Indebitat' Assumpsit for 200 l. for so much Money received by the Defendant for the use of the Plaintiffs.

The Defendant pleaded Non assumpsit, and upon that a Special Verdict was found, That in the Year 1681. before the Promiss supposed, &c. John Hammond was, and yet is, Archdeacon of Huntingdon, within the Diocess of Lincoln, and that the Bishop of Lincoln is Patron of the Archdeaconry, and that the Office of Register of the Court of Archdeaconry was time out of mind grantable by the Archdeacon for the Term of three Lives; and that the said John Hammond in the said Year 1681. for 100 l. sold and granted to Simon Michael and John Juce, for their Lives, the said Office of Register, it being an Office concerning the administration of Justice, and that by Colour thereof they enjoyed the Office till Juce died, which was in 1687. and soon after in the same year, the said Simon Michael died in the possession of the said Office, and that Hammond was no ways Convicted of selling the said Office upon any prosecution at Law, or otherwise. And they further said, That Thomas, Bishop of Lincoln, in the said Year 1687. after the Death of Juce, and some time before the Death of Michael, granted the said Office of Register to the Defendant Fox, and set forth the Grant in hæc verba, which mentioned the said Registers Office to be void by the Statute of the 5 & 6 Ed. 6. against Sale of Offices, and that thereupon it belonged to the said Bishop to grant the said Office, by virtue of which the said Fox became seised of the said Office prout lex postulat. And they find afterwards, that in the same Year that Juce and Michael died, Hammond being Archdeacon (as aforesaid) granted the said Office to the Plaintiffs, Woodward, Masters and Gilbert, for their Lives; and that they entred upon the said Office, and became seised thereof prout lex postulat. And they find that the Bishops Grant was Afterwards Confirmed by the Dean and Chapter; and they find, that afterwards, (viz.) the 22 of Octob. Anno regni *Willielmi & Mariæ* primo, the said King and Queen their Letters Patents under the Great Seal reciting, that the said Office appertained to Their Majesties, to grant by the said Statute of Edward the 6th, did grant the said Office of Register to the said Plaintiffs Woodward, Masters and Gilbert, for their Lives, and that by virtue thereof they entred upon and exercised the said Office, and

received divers fees and profits thereunto belonging; and that the Defendant having notice thereof, did take divers fees and profits of the said Office, amounting to 30 l. claiming them to his own use, &c. and if upon the whole Matter, &c.

Upon this Special Verdict there were these Points moved:

The first Point was, Whether this Office of Register could be granted for Lives?

This was not much insisted on by the Defendants Council, it having been usually granted, and so found by the Verdict. 3 Cro. Young and Fowler's Case, a Grant in Reversion of the Registers Office was allowed, being warranted by Usage; and so in 3 Cro. Young and Stoel. But unless there have been such Usage, 'tis not grantable in Reversion. Vide 3 Cro. Walker and Sir John Lamb.

The second Point was, Whether the Grant of this Office, in Consideration of Money, is void by the Statute of the 5th and 6th of Edward the 6th, against Sale of Offices?

That Point was also waved, it being Resolved in Dr. Trevor's Case, 12 Co. 78. 2 Cro. 269. so far as it concerned Administration of Justice.

The third Point was, That the Statute of 5 Ed. 6. Enacting, That the person who takes any Money for any Office, shall lose and forfeit all his Right to any such Office, &c. Whether the King or the Bishop shall take advantage of this forfeiture, in regard the Statute doth not express who shall dispose of the Office in such case?

And it was said on the part of the Plaintiff, That when a Statute gives a forfeiture, and not said to whom, the King shall have it, 11 Co. 60. a. unless there be a particular party grieved; as upon the Statute of 2 Ed. 6. of Tythes; and yet it was for some time before it was settled, that the Parson should have the treble Value in that Case. And this agrees with the Reason of the Common Law; things that are nullius in bonis, the King shall have them as extra Parochial Tythes, 11 H. 4. 17. Vid. 5 Co. in Sir Henry Constable's Case, The Soil of Navigable Rivers and derelict Lands was with this difference; If the Sea leaves the Land gradatim, and for but a little quantity, the Owner of the Land shall have it; but if in a great quantity at a time, it goes to the King, Davis Rep. 5. 6. Vid. Siderfin 86. Dyer 126. 'Tis true, at the Common Law, where a person hath an Interest in that which is forfeited, he shall have the benefit of it; as if a Park-keeper forfeit, it shall go to the Owner of the Park. And in Sir John Breon's Case, Bridgm. 27. where the Earl of Lancaster gave License to make a Park in his Forest, and the party forfeited his Office,

Office, the Earl had the advantage of it. In those cases the thing is forfeited to him from whom it was granted; as a Copyholder forfeits to his Lord, and Tenant for Life to him in Reversion; but here the Bishop hath nothing to do with the Office of Register, he cannot dispose of it in the time of Vacancy of the Archdeaconry. The Verdict finds, that his Office is to Register the Acts in the Court of the Archdeacon, and he must answer for his Register as his Superiour: And as this Verdict is found, it may be taken as an Archdeaconry by Prescription, and then it has no dependance upon the Bishop, but wholly exempt, Godolphin 61. and 5 Co. 15. in Cawdry's Case.

Levinz contra. Generally forfeitures given by the Statute go to the King, unless a Common person be grieved or particularly concerned; but here the Archdeacon has disabled himself to grant this Office of Register, and the Archdeacon himself is an Officer to the Bishop; for the Bishop hath the Care of the whole Diocess, and the other are but subordinate Officers to him; an Archdeacon may be deposed by the Bishop. The addition of a Parson is Clerk; because they were the Bishops Clerks or Curates. This Crime of coming into an Office for Money, is Simony by the Ecclesiastical Law. In the Vacancy of the Archdeaconry, if the Registers Office becomes void, the Bishop puts him in; but perhaps the succeeding Archdeacon shall remove him, because he must answer for him: As the Case of the Exigenter in Dyer, Scrogg's Case; and vid. 39 H.6.32.

And the Case was Adjourned for further Argument upon this last Point: But the Court held the other Matters to be clear.

Carr versus Donne.

Not. II. **R**OBERTUS DONNE nuper de South Creak in Trespass, Assault and False Imprisonment.
Com' predicto gen' Attach' fuit ad respondend' Willielmo Carr de placito quare Vi & armis in ipsum Willielmum apud South Creak præd' insult' fecit & ipm verberavit vulneravit imprisonavit & maletractavit & eum in Prisons diu detinuit Ita quod de vita ejus desperabatur Et alia enormia ei intulit ad grave dampn' ipsius Willielmi & contra Pacem Jacobi Secundi nuper Regis Angl' &c. Et unde idem Willielmus per Warner Dawes Attorn' suum queritur quod præd' Robertus primo die Maij anno regni dicti domini Jacobi Secundi nuper Regis Angl' &c. quarto Vi & armis videlicet gladiis baculis & cultellis in ipm Willielmum apud South Creak præd' insult' fecit & ipsum verberavit vulneravit imprisonavit & maletractavit & eum sic in Prisons diu videlicet per spatium unius mensis & quatuor dierum tunc px sequen' detinuit Ita quod de vita ejus desperabatur Et alia enormia &c. ad grave dampn' &c.
Et

The Count.

Et contra pacem &c. Unde dic' quod deteriorat' est Et dampn' habet ad valenciam ducentarum librarum Et inde produc' sectam &c.

As to the Vi
& armis &
vulnerationem,
Not guilty.

And Issue
thereupon.

As to the res.
due of the
Trespas he
pleads, that he
recorded Judg-
ment against
the Defendant,
and had him
taken upon a
Cap' ad satisf.
Recovery in
the Common
Bench.

Upon an Inde-
bitat' assumps.

And the Judg-
ment set aside
and vacated.

But before it
was vacated,
a Cap' ad sat.
was sued out
thereupon.

Directed to
the Sheriff.

And delivered
to him.

Who made his
Warrant to
Bayliff of the
Liberty.

Et præd' Robertus in propr' persona sua ven' & defend' vim & injur' &c. Et quoad venire Vi & armis necnon vulnerationem ipsius Willielmi præd' superius fieri supposit' idem Robertus dic' quod ipse in nullo est inde culpabilis Et de hoc pon' se super Patriam Et præd' Willielmus inde similiter Et quoad resid' Transgr' insult' & Imprisonament' prædict' superius fieri supposit' idem Robertus dic' quod præd' Willielmus acconem suam præd' inde versus cum habere non debet quia dicit quod diu ante præd' tempus quo supponitur præd' resid' Transgr' insult' & imprisonament' præd' superius fieri scilicet Termino sanctæ Trinitatis anno regni dicti nuper Regis secundo ipse idem Robertus in Cur' ipsius nuper Regis de Banco hic scilicet apud Westm' in Com' Midd' per Considerationem ejusdem Cur' recuperasset versus eundem Willielm' octo libras & decem solid' qui in eadem Cur' adjudicat' fuer' eidem Roberto tam pro dampnis suis quæ habuisset occasione non performacionis sepeal' pmissio' & assumptio' eidem Roberto per præfat' Willielm' antetunc fact' quam pmissis & custag' suis per ipsum circa sectam suam in ea parte apposit' unde Convict' fuit sed Judicium illud postea scilicet Termino Paschæ anno regni dicti nuper Regis quarto per eandem Cur' de Banco hic scilicet apud Westm' prædict' Certis de causis eidem Cur' adtunc moventibus evacuat' & adnullat' fuit & adhuc adnullat' existit quodque idem Robertus pro citiori obtencione dampnorum illorum ac mis' & custag' prædict' post Judicium prædict' in forma prædict' obtent' & ante adnullaconem ejusdem scilicet vicefimo tertio die Junij anno regni dicti nuper Regis secundo supradicto impetrasset & psecut' fuisset extra præd. Cur' dicti nuper Regis de Banco hic scilicet apud Westm' prædict' quoddam breve ipsius nuper Regis de Capias ad Satisfaciend' de & super Judicio illo versus præfat' Willielm' tunc Vic' Norf. direct' per quod quidem breve dom' nuper Rex eidem tunc Vic' præcepit quod caperet eundem Willielm' si invent' foret in balliva sua Et cum salvo custod' Ita quod haberet corpus ejus coram Justic' ipsius nuper Regis apud Westm' die Sabbati prox' post tres Septimanas sancti Michaelis tunc prox' sequen' ad Satisfaciend' eidem Roberto de dampnis illis Et quod haberet ibi breve illud Quod quidem breve postea & ante retorn' ejusdem scilicet vicefimo sexto die Junij anno regni dicti nuper Regis secundo supradicto apud South Creake prædict' deliberat' fuit cuidam Roberto Nightingale Mil' adtunc Vic' Com' Norf' existen' in debita Juris forma exequend' qui quidem Vic' adtunc & ibidem ad requisiconem ipsius Roberti mandavit executionem inde cuidam Willielmo Drage Armig' ballivo libertatis dicti nuper Regis Ducat' sui Lancastrie in prædicto Com' eo quod executio inde extra eandem libertatem fieri non potuit qui quidem

quidem ballivus adtunc habuit & adhuc habet plenam executionem & retorn' omni' Warrant' Præcept' & Mandat' infra eandem libertatem quodque Virtute mandat' illius præd' Willielmus Drage postea & ante retora' ejusdem brevis scilicet decimo octavo die Octobris anno regni dicti nuper Regis secundo supradicto apud South Creak prædict' in præd. Com' Norf. & infra libertatem præd' ad requisitionem ipsius Roberti manus suas super eundem Willielm' Carr molit' imposuit ac ipsi Willielm' Carr adtunc & ibidem per Corpus suum cepit & asportavit ac eundem Willielm' Carr in custodia sua ad instantiam ipsius Roberti ibidem habuit & detinuit per spatium un' mensis & quatuor dierum tunc prox' sequen' in execucone pro dampnis & custag' illis scilicet quousque idem Willielmus Carr ibidem solvit eidem Willielmo Drage ad usum ipsius Roberti dampna mis' & custag' illa quæ sunt idem resid' transgr' insult' & imprisonat' prædict' unde præd' Willielmus Carr superius se modo queritur absque hoc quod ipse idem Robertus est culpabilis de resid' transgr' insult' & imprisonament' præd' seu aliqua inde parte ad aliquod tempus ante emanacionem brevis præd' seu post retorn' ejusdem Et hoc parat' est verificare unde idem Robertus petit Judicium si præd' Willielmus Carr acconem suam præd' inde versus eum habere debet &c.

Et præd' Willielm' quoad præd' placit' præd' Roberti quoad præd' resid' transgr' insult' & imprisonament' præd' dic' quod ipse per aliqua in eodem placito præallegat' ab accone sua præd' inde versus ipsum Robertum habend' præcludi non debet Quia dic' quod præd' Robertus prædict' Termino Sanctæ Trinitatis anno regni domini Jacobi secundi nuper Regis Angl' &c. secundo & diu antea & adhuc est un' Attorn' Cur' de Banco hic quodque ipse præd' Robertus ratione officii sui Attorn' ejusdem Cur' ad intrand' Narracon' placita & Judicia in eadem Cur' in Rotulis ejusdem Cur' de tempore in tempus per eandem Cur' Creditus fuit (Anglicè *Trusted*) quodq; præd' Robertus sic Credicus existen' falso fraudulent' & contra officij sui debet' & in decepconem ejusdem Cur' in Rotulis ejusdem Cur' de præd' Termino Sanctæ Trinitatis præd' intrari fecit quod ipse idem Robertus per Consideraconem ejusdem Cur' recuperaret versus eundem Willielm' octo libras & decem solid' qui in eadem Cur' adjudicat' fuer' eidem Roberto tam pro dampnis suis quæ habuisset occasione non performaconis sepeal' p'mis' & assumpcon' eidem Roberto per præfat' Willielm' antetunc fact' quam p' mis' & custag' suis p' ipsum circa sectam suam in ea parte apposit' ubi revera null' tale Judicium in eadem Cur' versus eundem Willielm' intrari debuisset super qua quidem false intratione ipse præd' Robertus ante præd' tempus præd' resid' transgr' insult' & imprisonament' falso & improvide prosecut' fuit quoddam breve de Capias ad Satisfaciend' versus eundem Willielm' tunc Vic' Norf. direct' Colore cujus quidem brevis ipse præd' Robertus præd' tempore quo &c. de Injur' sua p'p' Vi & armis in ipsum Willielm' insult' fecit & ipsum verberavit imprisonavit & maletrā-

Which execution of Precepts.

The Bayliff takes the Defendant thereupon.

And had him a Month in Custody until he paid the Money.

Quod est idem Resid' transgr' & imprisonament' &c.

An traverses, that he is not guilty of any other Trespass before the Suing out, and after the Return of the said Writ.

The Plaintiff Replies, That the Plaintiff in the Judgment was an Attorney, whose duty it is to Enter Judgments fairly and honestly, and that he is deceit of the Court entered the Judgment, when he ought not to have done it.

The Judgment
adjudged to be
void.

The Plaintiff
in the Judg-
ment confesseth
the matter ;
but saith that
the fault was
in the Clerk,
who Entred
the Judgment.

He appointed
the Judgment
to be duly
Entred.

Put by the
default of that
Clerk it was
Entred irregu-
larly.
And Traverses,
that it was En-
tered *falso &*
fraudulenter
in deceptionem
Curie.

The Plaintiff
Demurs to the
Rejoinder.

maletractavit Ita quod de vita ejus desperabatur prout ipse superius versus eum narravit Et idem Willielmus ulterius dic' qd' postea scilicet prædict' Termino Paschæ Anno regni dicti domini Jacobi Secundi nuper Regis Angl' quarto supradicto Examinacon' & Consideracon' de Intracon' prædict' per eandem Cur' hic habita eadem Intracon' fuisse ab initio inde vacua & pro nullo Judicio per eand' Cur' adjudicat' & declarat' fuit Et hoc parat' est verificare Unde ex quo præd' Robertus transgr' insult' & imprisonament' præd' superius cognovit idem Willielmus petit Judicium & dampna sua occon' transgr' insult' & imprisonament' præd' sibi adjudicari &c.

Et prædict' Robertus dic' quod bene & verum est quod ipse idem Robertus in Rotulis dictæ Cur' nuper Regis de Banco intrati fecit Judicium in placito præd' Roberti menconat' scilicet quod ipse idem Robertus per Consideracon' ejusdem Cur' recuperaret versus prædict' Willielm' octo libr' & decem solid' qui in eadem Cur' adjudicat' fuer' eidem Roberto tam pro dampnis suis quæ habuisset occon' non per formacon' sepeal' promis' & assumpcon' eidem Roberto per præfat' Willielm' fact' quam pro mis' & custag' suis per ipsum circa sectam suam in ea parte apposit' prout præd' Willielm' superius inde replicando allegavit Idemque Robertus ulterius in facto dic' quod præd' Robertus appunctuavit intracon' Judicij illius in Rotulis præd' fieri debite & secund' cursum & consuetud' ejusdem Cur' scilicet apud Westm' prædict' sed per negligentiam Clerici qui Judicium illud intravit evenit qd' Judicium illud in aliquibus circumstantiis intrat' fuit irregularit' & contra quandam regulam ejusdem Cur' sine noticia ipsius Roberti ac ratione hujusm' irregular' intrat' ill' præd' Termino Paschæ Anno regni dicti nuper Regis quarto supradicto per eandem Cur' de Banco evactat' fuit & adnullat' prout idem Robertus superius inde placitando allegavit absque hoc quod Intracon' ill' facta fuit per ipsum Robertum falso fraudulent' ac in decepconem ejusdem Cur' modo & forma prout prædict' Willielmus superius inde replicando allegavit Et hoc parat' est verificare Unde ut prius petit Judicium Et quod prædict' Willielmus ab accon' sua prædict' inde versus eum habend' præcludatur, &c.

Et prædict' Willielmus dic' quod ipse per aliquâ per præd' Robertum superius rejungen' allegat' ab accon' sua prædicta inde versus ipsum Robertum habend' præcludi non debet quia dic' quod placit' prædict' per eundem Robertum modo & forma prædict' superius rejungen' placitat' materiaque in eodem content' minus suffic' in lege existunt ad ipsum Willielmum ab accon' sua prædicta versus præfat' Robertum habend' præcludend' Ad quod idem Willielmus necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' respons' in hac parte idem Willielm' petit Judicium & dampna sua prædicta sibi adjudicari &c.

Et

Et prædict' Robertus ex quo ipse sufficien' materiam in lege ad prædict' Willielm' ab accon' sua prædicta versus ipsum Robertum habend' præcludend' superius rejunge' allegavit quam ipse parat' est verificare quam quidem materiam prædict' Willielm' non dedic' nec ad eam aliqualit' respond' set verificationem ill' admittere omnino recusat ut prius perit Judicium Et quod prædict' Willielm' ab accon' sua prædict' versus eum habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super præmissis prædict' unde partes prædict' posuer' se in Judic' Cur' priusquam Judic' inde reddant dies dat' est partibus prædict' hic usque à die Pasche in quindecim dies de audiend' inde Judic' eo quod iidem Justic' hic inde nondum &c.

The Defendant
joins in De-
murrer.

Carr versus Donne.

In an Action of Trespass the Plaintiff declared upon an Assault, Battery, Wounding and Imprisonment.

The Defendant, as to the Vi & armis & vulnerationem, pleaded Not guilty; & quoad resid' transgr' insult' & imprisonment' he Justified, for that he obtained Judgment against the Plaintiff in the Common Bench; and that a Capias ad satisfaciend' was thereupon awarded to the Sheriff, which being delivered to the Sheriff, he at the Request of the Defendant, Mandavit Executionem inde cuidam Willielmo Broge Balliv' libertatis domini Regis Ducatus sui Lancast' eo quod executio inde extra eandem libertatem fieri non potuit &c. Which said Bayliff had the Return and Execution of all Warrants, Precepts, Mandates, &c. by virtue of which the said Bayliff, molliter manus imposuit upon the Plaintiff, and arrested him, &c.

Upon a Demurrer it was Adjudged for the Plaintiff for an apparent fault in the Plea, which was, that he had not pleaded to the Battery. Powel said, that the Plea was also naught, because it sets forth a Mandate to the Bayliff of the Liberty; and did not shew that it was under the Hand and Seal of the Sheriff.

Norwood versus Woodly.

In an Indebit' assumpsit for Goods sold. The Defendant pleaded the Statute of Limitations. The Plaintiff Replied. That before the Six years were out he brought an Original in Trespass against the Defendant, ea intentione to Declare against the Defendant in an Assumpsit, secund' consuetud' Cur' de tempore cujus &c. The Defendant said; that there was no such Record; and the Plaintiff produced an Original in Trespass brought within the time against the Defendant and two others;

E c

and

and it was in Trespas and insult in London. And it was moved, that this Record did not make good the Replication; for 'tis against Three, and it should have been in a Clausum fregit; for that was said to be the course of the Court, to declare in any thing upon such a Writ.

But the Prothonotary Informed the Court, that the Original being in London, the Curfitor would not make a Clausum fregit into London; (for which no Reason was given) and that therefore, tho' in other Counties it is to be a Clausum fregit; yet Trespas and Insult would do in this Case, and so was the constant Practice. And the Plaintiffs Replication is, that he thought an Original in Trespas generally; so it may be applied to this, and 'tis not material tho' others be joyned in the Writ with the Defendant.

But the Court doubted of the Practice.

Anonymus.

An Attachment was granted against an Attorney for a Misdemeanor in Practice, and upon a Rule of Court it was referred to the Prothonotary to tax Costs for the party grieved; which were taxed accordingly; and then came out the Act of General Pardon, which discharged the Contempt.

The Court inclined, that the Costs were also discharged, tho' taxed before the Pardon; for that they are not Costs upon a Judicial Proceeding, but a kind of Composition with the Offender, who submits to pay Costs to the Injured party to be eased of the Penalty for his Contempt; and so not like Costs taxed in the Ecclesiastical Court per reformationem morum, as in 5 Co. 51. and in 3 Cro. 6.

Nota, In the Dutchy Court this Term, in a Suit in Equity, Costs were taxed (upon a Contempt) to the party grieved before the Pardon.

And the Opinion of the Lord Chief Baron Ackyns and Justice Ventris, who attended there as Assessors, was, That the Costs were not discharged.

But that was in a Court of Equity, where Costs are at the pleasure of the Judge.

Anonymus.

Anonymus.

In an Action of Trespass, Quare clausum fregit; where as to some part there was Not guilty pleaded, and as to the other a Special Justification; and a Verdict upon the General Issue for the Plaintiff, and upon the Special Issue for the Defendant.

The Court took this to be within the late Statute, for the Plaintiff to have no more Costs than Damages; because the Issue upon the Matter specially pleaded, was found for the Defendant; and so the same thing if the General Issue had been only pleaded, and found for the Plaintiff.

Fagg *versus* Roberts & al'.

Nota, Upon a Trial at Bar in an Ejectment, where two were made Defendants, and had entered into the Common Rule, and at the Trial one appeared and confessed Lease, Entry, &c. but the other did not. And after Evidence given the Plaintiff was Non-suited, and Costs taxed for the Defendants.

The Court said, that both these Defendants were entitled to these Costs, and he that did not appear might release them to the Plaintiff; but they said, that if there should appear to be Covin between the Lessor of the Plaintiff, and the Defendant, who did not appear to release the Costs; the Court supposed that they might correct such Practice, when it should be made appear.

Bright *versus* Addy.

An Action of Trespass, Quare clausum fregit, was brought by Baron and Feme.

Polluxfen, Chief Justice, was of Opinion, that the Feme could not be joyned, tho' it was her Land.

Ventris contra. For this Action will survive, and they have election either to joyn, or to bring it alone, 1 Brownl. 21. 1 Ro. Abr. 348. Hob. 189. 1 Cro. 96. 3 Cro. Tregniel and Reeve, Mo. 5. In an Action of Forcible Entry upon the Wives Land, after the Coverture, she was joyned with the Husband. Adjournatur.

Anonymus.

In an Assumpsit against the Administratrix, the Defendant pleaded quod ipsa non assumpsit instead of the Intestate. After Verdict a Repleader was awarded, and no Costs to either party upon a Repleader.

Marks *versus* Nottingham.

The Defendant pleaded in Abatement, that the Plaintiff was dead at such a place before the Action brought.

The Court doubted, whether such Plea could be received; but upon view of Rastall's Entries 161. pl. 6. where the like Plea was.

Powell and Ventris conceived it to be a good Plea.

Pollexfen Ch. Justice and Rokeby said, that that in Rastall differed, because there were two Plaintiffs, so that Issue might be joyned with the other Plaintiff. Sed vide librum, where the Replication to that Plea is, that W. H. & prædict' R. B. Attornat' præd' J. (which J. was pleaded to be dead) nomine & pro ipso J. Magistro suo dicit, quod breve præd' ratione præallegat' cassari non debet quia dicit quod præd' J. superstes & in plena vita existit (viz.) apud L. in Com. N. & non mortuus prout præd' W. superius allegavit & hoc petit quod inquiretur per Patriam & præd' W. similiter &c. Adjornatur.

Hafelwood *versus* Mansfield.

In Debt for 150 l. the Plaintiff declared upon a Charter-party, which contained divers mutual Agreements; and in performance conventionum præd' ex parte dicti Magistri ipse obligasset se dicto Mercatori in penali summa 150 l. & ad performance convention' præd' ex parte dicti Mercator' obligasset se dicto Magistro &c. in simili penali summa 150 l. &c. And this Action was brought by the Master of the Ship against the Merchant.

The Defendant pleaded an Insufficient Plea, to which there was a Demurrer.

But it was moved, that the Declaration was Insufficient; for when it comes to the Penalty on the Merchants part it is only obligasset se, omitting ipse, or ipse præd' Mercator obligasset se; so 'tis not expressly declared that the Defendant was bound.

And

And of that Opinion were Pollexfen Chief Justice, Powell and Rokeby.

Ventris contra. For it is obligasset se dicto Magistro, so none but the Merchant can be understood to be bound; and if it were ipse obligasset it had been good, and that is understood.

But Judgment was given for the Defendant.

Snode versus Ward.

In an Indebitat' assumpsit for Goods sold.

The Defendant pleaded quod ipse infra sex annos proxime antedictam impetrationis Brevis Originalis ipsius Quer' non assumpsit.

To which the Plaintiff demurred.

1. Because the late Statute of 1 Willielm & Maria, for revising of Process, doth Enact, That the Time from the 11th of December 1688, to the 13th of February then next following, should not be accounted as any part of the Time upon the Statute of Limitations. And therefore the Defendant should have pleaded, that he did not assume within six years and so many days as were between the 11th of December and the 13th of February. And it was said, so had the Pleading been ever since the said Statute.

But the Court Resolved, that the Pleading might be still in such manner as before the Statute: For the Statute is, that those Days shall be no part of the time; and therefore pleading non assumpsit infra sex annos is to be understood of six years exclusive of those Days between the 11th of December and the 13th of February.

2. Another Exception was taken to the Plea, for that it is ante impetrationem Brevis Original' ipsius Quer', and doth not say præd' brevis, and so it may be referred to some other Writ the Plaintiff might have.

Pollexfen Chief Justice inclined, that it was naught for this Cause. Adjournatur.

Vid. 8 Co. 57. The Earl of Rutland's Case: He pleads, that he was seised of the Park of Clipham, and granted officium Parci sui, and not (as præd' Parci; and held it good. Vid. 2 Cro. 188. Burton and Eyre.

Humphreys

Humphreys versus Bethily.

In an Action of Debt upon a Penal Bill, where the Defendant was to pay 10 s. upon the 11th of June, and 10 s. more upon the 10th of July next following, and so 10 s. every three Weeks after, till a certain Sum were satisfied by such several payments. And for the true payment thereof, the Defendant obliged himself in the Penal Sum of 7 l.

The Plaintiff in facta dicit pleaded, that the Defendant did not pay the said Sum, or any part thereof, upon the several days aforesaid, unde actio accrevit for the 7 l.

The Defendant pleaded, that he paid 10 s. upon the 11th of June, & hoc paratus est verificare, &c.

The Plaintiff Replied, that he did not pay it, & hoc petit quod inquiratur per Patriam. To which the Defendant demurred.

The Plea was held altogether Insufficient.

But then Pollexfen Chief Justice observed that the Declaration was naught; for he should have declared, that the Defendant failed in payment of one of the Sums, which would have been enough to have entitled him to the Penalty; but he says, The said several Sums of Money, or any of them, and this is double; and he inclined that it was not aided by Answering over, or by the General Demurrer. Adjournatur.

Vide Saunders and Crowley, 1 Ro. 112.

Thompson versus Leach.

In an Ejectment by Thomas Thompson against Sir Simon Leach and divers other Defendants, upon the Demise of Charles Leach of the Mannor of Bulkworthy, and divers Messuages, Lands and Tenements.

Upon Not Guilty pleaded, a Special Verdict was found to this effect: Viz.

That Nicholas Leach was seised in fee of the said Mannors, Lands and Tenements in the Declaration; and by his last Will in Writing, bearing date the 9th day of December in the 19th year of the Reign of the late King Charles the Second, devised the Premises to his Brother Simon Leach for Life, remainder to the first Son of the Body of the said Simon, and the Heirs Males of the Body of such first Son, and in like manner to the second, third Son, &c. and for want of Issue of the said Simon Leach, the remainder to Sir Simon Leach and the Heirs Males of his Body; and for default of such Issue to the right Heirs of Nicholas the Cestator.

Tesator; for ever; and that the said Nicholas died seised of the Premises, and after his decease the said Simon Leach entered and became seised for Life, with Remainders over, as aforesaid; and being so seised made a Deed, bearing date the 23th of August, in the 27th year of the Reign of the said King Charles, sealed and delivered to the use of the said Sir Simon Leach (but he was not present) which Deed the Verdict sets forth in hinc verba; and by it he granted and surrendered to the said Sir Simon Leach, his Heirs and Assigns, the said Mannor and Premises, the Reversion and Remainders, Remainders and Remainders of the same: To have and to hold the same to the said Sir Simon Leach and his Heirs, to the use of him and his Heirs; and they find that the said Charles Leach, Lessee of the Plaintiff, the first Son of the said Sir Simon Leach was born the first of November, in the 25th year of the Reign of the said King Charles, and not before; and that Simon Leach, from the time of his sealing the Deed to the 27th of May, in the 30th year of the said King Charles, continued possessed of the Premises; and that then, and not before, Sir Simon Leach accepted and agreed to the said Surrender, and entered into the Premises; and that afterwards the said Simon Leach, Brother of the said Nicholas the Tesator died, and the said Charles Leach his Son, after his decease entered into the Premises, and demised them to the Plaintiff, who by virtue thereof entered and became possessed, and so continued till the said Simon Leach and the other Defendants, by his Command, ejected him. But whether, upon the whole Matter, the said Simon Leach did surrender the said Mannor and Premises to the said Sir Simon Leach, before the said Charles Leach was born; and if he did not surrender before the birth of the said Charles Leach, then they find the Defendants Guilty; and if he did surrender them before the birth, then they find for the Defendants.

And Rolleston Chief Justice, Powell and Rokeby, were of Opinion that here was no Surrender till such time as Sir Simon Leach had notice of the Deed of Surrender, and agreed to it; and so the Remainder was vested in Charles the Son; and it was not defeated by the Agreement of Sir Simon after his birth, to the Surrender.

But Keble dissented, and his Argument was as follows. That he said the Case to no more than this; Simon Leach, Tenant for Life, surrendered to his first Son, Remainders in Tail to Sir Simon Leach. Simon Leach before the birth of that Son by Deed, sealed and delivered to the use of Sir Simon (and in his Absence and without his Heirs) surrendered his Estate to Sir Simon, and continued the possession until after the birth of his Son; and then Sir Simon Leach agreed to the Surrender, whether

Whether this Surrender shall be taken as a good and effectual Surrender before the Son born?

There are two Points which have been spoken to in this Case at the Bar.

First, Whether by the Sealing of the Deed of Surrender the Estate immediately passed to Sir Simon Leach; for then the Contingent Remainder could not vest in the after-born Son; there being no Estate left in Simon Leach his father to support it?

Secondly, Whether after the assent of Sir Simon Leach, tho' it were given after the birth of the Son, doth not so relate as to make it a Surrender from the Sealing of the Deed, and thereby defeat the Remainder which before such Assent was vested in the Son?

I think these Points include all that is material in the Case, and I shall speak to the Second Point, because I would rid it out of the Case. For as to that Point I conceive, that if it be admitted, that the Estate for Life continued in Simon Leach till the Assent of Sir Simon, that the Remainder being vested in Charles the second Son before such Assent, there can be no Relation that shall divest it.

I do not go upon the General Rule, That Relations shall not do wrong to Strangers.

'Tis true, Relations are fictions in Law; which are always accompanied with Equity.

But 'tis as true, that there is sometimes loss and damage to Third Persons consequent upon them; but then 'tis what the Law calls *Damnum absque injuria*, which is a known and stated difference in the Law, as my Brother Pemberton urged it. But I think there needs nothing of that to be considered in this Point.

But the Reason which I go upon is, That the Relation here, let it be never so strong, cannot hurt or disturb the Remainder in Charles Leach in this Case; for that the Remainder is in him by a Title antecedent and paramount to the Deed of Surrender, to which the Assent of Sir Simon Leach relates; so that it plainly overreaches the Relation.

If an Estate in Remainder, or otherwise, ariseth to one upon a Contingency or a Power reserved upon a Fine or Feoffment to uses, when the Estate is once raised or vested it relates to the Fine or Feoffment, as if it were immediately limited thereupon, 1 Co. 133, 156. In this Remainder, when vested in Charles, he is in immediately by the Will, and out of danger of his Remainder being divested by any act done since, as the Surrender is.

I will put one Case, I think full to this Matter, and so dismiss this Point.

It cannot be denied, but that there is as strong a Relation upon a disagreement to an Estate, as upon an agreement, where the Estate was Conveyed without the Notice of him that afterwards agrees or disagrees; if the Husband discontinues the Wife's Estate, and then the Discontinuee conveys the Estate back to the Wife in the absence of the Husband, who (as soon as he knows of it) disagrees to the Estate, this shall not take away the Remitter which the Law wrought upon the first taking the Estate from the Discontinuee. And so is Litt. cap. Remitter, Co. 11 Inst. 336. b. *Jones 78.* The true Reason is, because he is in of a Title paramount to the Conveyance to which the Disagreement relates, tho' that indeed was the foundation of the Remitter, which by the Disagreement might seem to be avoided. This therefore I take to be a stronger Case than that at the Bar: So that if there were no Surrender before the birth of Charles the Son, there can be none after by any Construction of Law; for that would be in avoidance of an Estate settled by a Title antecedent to such Surrender, whereas Relations are to avoid Merit Acts; and I believe there can be no Case put upon Relations that go any further, and it would be against all Reason if it should be otherwise.

But as to the first Point, I am of Opinion, that upon the making of the Deed of Surrender, the freehold and Estate of Simon Leach did immediately vest in Sir Simon, before he had notice, or gave any express consent to it; and so it was a Surrender before Charles was born, and then the Contingent Remainder could never vest in him, there being no particular Estate to support it.

A Surrender is a particular sort of Conveyance that works by the Common Law. And it has been agreed, and I think I can make it plainly appear, that Conveyances at the Common Law, do immediately (upon the Execution of them on the Grantors part) divest the Estate out of him, and put it in the party to whom such Conveyance is made; tho' in his absence, or without his notice, till some disagreement to such Estate appears. I speak of Conveyances at the Common Law; for I shall say nothing of Conveyances that work upon the Statute of Uses, or of Conveyances by Custom, as Surrenders of Copyholds, or the like, as being guided by the particular penning of Statutes; and by Custom and Usage, and Matters altogether foreign to the Case in question.

In Conveyances that are by the Common Law, sometimes a Deed is sufficient (and in Surrenders sometimes Words without a Deed) without further Circumstance or Ceremony; and sometimes a further Act is requisite to give them effect, as Livery of Seisin, Attornment, and sometimes Entry of the party, as in case of Exchanges; and as well in those Conveyances that require a

Deed only, as those which require some further Act to perfect them, so soon as they are executed on the Grantors part, they immediately pass the Estate. In case of a Deed of Feoffment to divers persons, and Livery made to one Feoffee in the absence of the rest, the Estate vests in them all till Dissent, 2 Leon. 23. Mutton's Case. And so 223. an Estate made to a Feme Covert by Livery, vests in her before any Agreement of the Husband, Co. 1 Inst. 356. a. So of a Grant of a Reversion after Attornment of the Lessee, passeth the Freehold by the Deed, Co. 1 Inst. 49. a. Litt. Sect. 66. In case of a Lease, the Lessee hath right immediately to have the Tenements by force of the Lease. So in the case of Limitation of Remainders and of Devises, (which tho' a Conveyance introduced by the Statute, yet operates according to the Common Law) the Freehold passeth to the Devisee before notice or assent. I do not cite Authorities, which are plentiful enough in these matters, because they that have Argued for the Plaintiff have in a manner agreed, that in Conveyances at the Common Law, generally the Estate passeth to the party, till he divests it by some disagreement.

But 'tis Objected, That in case of Surrenders, an express assent of the Surrendree is a Circumstance requisite; as Attornment to a Grant of a Reversion, Livery to a Feoffment, or Execution by Entry, in case of an Exchange.

To which I Answer, That an Assent is not only a Circumstance, but 'tis essential to all Conveyances; for they are Contracts, *actus contra actum*, which necessarily suppose the assent of all parties: But this is not at all to be compared with such collateral Acts or Circumstances, that by the Positive Law are made the effectual parts of a Conveyance; as Attornment, Livery, or the like; for the Assent of the party that takes, is implied in all Conveyances, and this is by Intendment of Law, which is as strong as the Expression of the party, till the contrary appears; *stabit præsumptio donec probetur in contrarium*.

But to make this thing clear, my Lord Coke in his first Institutes, fol. 50. where he gives instances of Conveyances that work without Livery, or further Circumstance or Ceremony, puts the Cases of Lease and Release, Confirmation, Devise and Surrenders, amongst the rest; whereas if an express Assent of the Surrendree were a Circumstance to make it effectual, sure he would have mentioned it, and not martiall'd it with such Conveyances as I have shewn before, need no such assent, nor any thing further than a Deed.

The Case of Exchanges has been put as an Instance of a Conveyance at Law, that doth not work immediately; but that can't be compar'd to the Case in question, but stands upon its particular Reasons; for there must be a mutual express Consent, because

because in Exchanges there must be a Reciprocal Grant, as appears by Littleton.

Having, I hope, made out (and much more might have been added, but that I find it has been agreed) that Conveyances work immediately upon the Execution of them on the part of him that makes them, I will now endeavour to shew the Reasons, why they do so immediately vest the Estate in the party without any express Consent; and to shew that these Reasons do hold as strongly in case of Surrenders, as of any other Conveyances at Law; and then consider the Inconveniences and ill Consequences that have been Objected, would ensue, if Surrenders should operate without an express Consent; and to shew, that the same are to be Objected as to all other Conveyances, and that very odd Consequences and Inconveniences would follow, if Surrenders should be ineffectual till an express Consent of the Surrenderee; and then shall endeavour to Answer the Arguments that have been made on the other Side, from the putting of Cases of Surrenders in the Books, which are generally mentioned, to be with mutual Assent, and from the manner of Pleading of Surrenders.

The Reasons why Conveyances do divest the Estate out of the Grantor, before any express Assent or perhaps Notice of the Grantee, I conceive to be these Three:

First, Because there is a strong Intendment of Law, that so a man to take an Estate it is for his benefit, and no man can be supposed to be unwilling to that which is for his Advantage. 1 Rep. 44. Where an Act is done for a mans benefit an Agreement is implied, till there be a Disagreement. This does not hold only in Conveyances, but in the Gift of Goods, 3 Co. 26. A Grant of Goods vests the property in the Grantee before Notice. So of things in Action; A Bond is sealed and delivered to a mans use; who dies before Notice, his Executors may bring an Action. Dyer 167. An Estate made to a Feme Covert vests in her immediately, till the Husband disagrees. So is my Lord Hobart 204. in Swain and Holman's Case. Now is there not the same presumption and appearance of Benefit to him in Reversion in case of a Surrender? Is it not a palpable Advantage to him to determine the particular Estate, and to reduce his Estate into possession? and therefore, why should not his Assent be implied; as well as in other Conveyances?

Secondly, A second Reason is, Because it would seem incongruous and absurd, that when a Conveyance is compleatly executed on the Grantors part, yet notwithstanding the Estate should continue in him. The words of my Lord Coke (1 Inst. 217. a) are, That it cannot stand with any Reason, that a Freehold should remain in a man against his own Livery when there is a person able to take it. There needs only a Capacity to take, his Will to take is in-

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tended. Why should it not seem as unreasonable, that the Estate should remain in Simon Leach, against his own Deed of Surrender? for in case of a Surrender, a Deed, and sometimes Words without a Deed, are as effectual as a Livery in case of a Feoffment.

Thirdly, The third and principal Reason, as I take it, why the Law will not suffer the Operation of a Conveyance to be in suspense, and to expect the Agreement of the party to whom 'twas made, is to prevent the Uncertainty of the Freehold. This I take to be the great Reason why a Freehold cannot be granted in futuro, because that it would be very hard and inconvenient that a man should be driven to bring his Præcipe of Real Action first against the Grantor, and after he had proceeded in it a considerable time, it should abate by the transferring the Freehold to a Stranger, by reason of his Agreement to some Conveyance made before the Writ brought; for otherwise there is nothing in the nature of the thing against Conveying a Freehold in futuro; for a Rent de novo may be so granted; because that being newly Created, there can be no precedent Right to bring any Real Action for it, Palmer 29, 30.

Now in this Case, suppose a Præcipe had been brought against Simon Leach, this should have proceeded, and he could not have pleaded in Abatement till Sir Simon Leach had assented; and after a long progress in the Suit he might have pleaded, that Sir Simon Leach assented puis darrein continuance, and defeated all. So that the same Inconvenience, as to the bringing of Real Actions, holds in Surrenders, as in other Conveyances.

And so shew that it is not a slight matter, but what the Law much considers, and is very careful to have the Freehold fixed, and will never suffer it to be in abeyance, or under such uncertainty; as a Stranger that demands Right should not know where to fix his Action.

A multitude of Cases might be cited; but I will cite only a Case put 1 H. 6. 2. a. because it seems something of a singular nature, Lord and Villain, Mortgagor and Mortgagee, may be both made Tenants.

But it will be said here, that if a Præcipe had been brought against Sir Simon Leach, might not he have pleaded his Disagreement, and so abated the Writ by Nontenure?

'Tis true; but that Inconvenience had been no more than in all other Cases, a Plea of Nontenure, and it must have abated immediately; for he could not have abated it by any dissent after he had answered to the Writ. Whereas I have shewn it in the other Case, it may be after a long progress in the Suit.

Again,

Again, It's very improbable that he should dissent; whereas on the other side, an Assent is the likeliest thing in the world; so the mischief to the Demandant is not near so great, nor the hundredth part so probable.

Now I come to consider those Inconveniences that have been urged that would ensue, if a Surrender should work immediately.

It has been said, That a Tenant for Life might make such Deed of Surrender, and continue in possession, and suffer a Recovery; and this might destroy a great many Recoveries, and overthrow Marriage Settlements, and defeat Charges and Securities upon his Estate after such Deed of Surrender.

These, and a great many more such like Mischiefs, may be instanced in Surrenders; but they hold no less in any other Conveyance, whereby a man may (as has been shewed before) divest himself of the Estate, and yet continue the Possession; and in this Case the Assent of the Surrenderee, tho' he doth not enter, would (as it is agreed of all hands) vest the Estate in him, Hutton 95. Br. tit. Surrender 50. tho' he cannot have Trespass before Entry, and that Assent might be kept as private, and let in all the Mischiefs before mentioned as if no such Assent were necessary.

And this I think sufficient to Answer to the Inconveniences objected on that side.

Now let us see what Inconveniences and odd Consequences would follow, in case a Surrender could not operate till the express Assent of the Surrenderee, then no Surrender could be to an Infant at least, when under the age of Discretion; for if it be a necessary Circumstance, it cannot be dispensed with no more than Livery or Attornment. So tho' an Infant of a year Old is capable to take an Estate, because for his benefit he could not take a particular Estate, upon which he had a Reversion immediately expectant, because it must enure by Surrender. If there be Jointenants in Reversion, a Surrender to one of them enures to both, 1 Inst. 192. 214.2. so there, as to one Society, it operates without Assent or Notice.

Suppose Tenant for Life should make Livery upon a Grant of his Estate to him in Reversion and two others, and the Livery is made to the other two in the absence, and without the Notice of him in Reversion, Should the Livery not work immediately for a Third part of the Estate? And if it doth, it must enure as a Surrender for a Third Part. So is Bro. tit. Surrender, and 3 Co. 76.

If Tenant for Life should by Lease and Release convey the Lands held by him for Life, together with other Lands to him in Reversion who knows nothing of the Sealing of the Deed; should this pass the other Lands presently, and the Lands held for Life not till after an express Assent, because as to those Lands it must work as a Surrender? Plainly an express Assent is not necessary. For if the Grantee enters, this is sufficient.

I come in the last place to Answer those Arguments that have been made from the manner of putting the Case of Surrenders in the Book, and the Form of pleading Surrenders, Co. 1 Inst. 337.b.

First, A Surrender is a yielding up of the Estate, which grows by mutual Agreement between them. Tenant for Life, by Agreement of him in Reversion, surrenders to him; he hath a Freehold before he enters. And so Perkins, in putting the Case of a Surrender, mentions an Agreement; and divers other Books have been cited to the same purpose.

To all which I Answer:

No doubt but an Agreement is necessary. But the Question is, Whether an Agreement is not intended where a Deed of Surrender is made in the absence of him in the Reversion; whether the Law shall not suppose an Assent, till a Disagreement appears?

Indeed, if he were present, he must agree or disagree immediately; and so 'tis in all other Conveyances. The Cases put in Perkins, Sect. 607, 608, 609. are all of Surrenders made to the Lessor in person; for thus he puts them: The Lessee comes to the Lessor, and the Lessee saith to the Lessor, I surrender, saith he, if the Lessor doth not agree, 'tis void; Car il ne poit surrender à luy maigre son dents. And that is certainly so in Surrenders, and all other Conveyances; for a man cannot have an Estate put into him in spite of his Teeth.

But I cannot find any of the Books cited that come to this Point, That where a Deed of Surrender is executed without the Notice of him in Reversion, that it shall pass nothing till he Consents; so that it cannot be said, that there is any express Authority in the Case.

Now, as to the Form of Pleading of a Surrender it has been Objected, That a Surrender is always pleaded with Acceptance; and many Cases have been cited of such Pleadings, Rastal's Entries 176, 177. Fitzh. tit. Barre 262. which are Cases in Actions of Debt for Rent, and the Defendant in Bar pleads, That he surrendered before the Rent grew due, and shews, that the Plaintiff accepted the Surrender: So in Waste brought, a Surrender pleaded with the Agreement of the Plaintiff.

These

These and the like Cases have been very materially, and I think fully Answered at the Bar by my Brother Pemberton; That those Actions being in Disaffirmance of the Surrender, and implying a Disagreement, the Defendant had no way to bar or avoid such Disagreement; but by shewing an express Agreement before.

The Case of Peto and Pemberton in the 3 Cro. 101. that has been so often cited, is of the same Sort: In a Replevin the Avowry was for a Rent-charge; in Bar of which 'tis pleaded, That the Plaintiff demised the Land out of which the Rent issued, to the Avowant. The Avowant Replies, That he surrendered dimissionem prædictæ to which the Plaintiff agreed. This is the same with Pleading in Bar to an Action of Debt for Rent: But when the Action is in pursuance of the Surrender, then it is not pleaded.

So is Rast. Entries 136. The Lessee brought an Action Covenant against the Lessor, for entering upon him, and ousting of him. The Defendant pleads a Surrender in Bar, and that without any Agreement or Acceptance.

In Fitzherbert, tit. Debt. 149. where the Case is in an Action of Debt for Rent: The Defendant pleaded in Bar, that he surrendered, by force of which the Plaintiff became seised: There is no mention of pleading any Agreement, notwithstanding that the Action was in Disaffirmance of the Surrender.

Wherefore, as to the Argument which has been drawn against the Form of Pleading, I say, that if an Agreement be necessary to be pleaded: Then, I say,

First, That 'tis answer'd by an implied Assent, as well as an express Assent. I would put the Case; Suppose a Lessee for Life should make a Lease for years, reserving Rent; and in Debt for the Rent the Lessee should plead, That the Plaintiff before the Rent grew due surrendered to him in Reversion, and he accepted it, and Issue is upon the Acceptance; and at the Trial it is proved, that the Plaintiff had executed a Deed of Surrender (as in this Case) to him in Reversion in his absence; would not this turn the Proof upon the Plaintiff, that he in Reversion disagreed to this Surrender? for surely his Agreement is prima facie presumed, and then the Rule is, *stabit præsumptio donec probetur in contrarium*.

Again, I say it appears by the Cases cited that it is not always pleaded, and when pleaded 'tis upon a special Reason, as I have shewn before, i. e. to conclude the party from disagreeing; and it would be very hard to prove in Reason, that an Agreement (admitting an express Assent to be necessary) must be pleaded; for if it were a necessary Circumstance to the Conveyance, why then 'tis imply'd

imply'd in pleading sursum reddidit; for it cannot be a Surrender without it.

In pleading of a Feoffment it is enough to say Feoffavit, for that implies Livery; for it cannot be a Feoffment without it.

Now why should not sursum reddidit imply all necessary requisites, as well as Feoffavit? and therefore I do not see that any great Argument can be drawn from the Pleading. For,

1. It is not always to be pleaded.

2. It cannot be made out to be necessary so to plead it; for if Assent be a necessary requisite, then 'tis implied by saying sursum reddidit, as Livery is in Feoffavit; and then to add the words of Express Consent is as superfluous, as to shew Livery after saying Feoffavit.

And again, If it were always necessary, it is sufficiently answered by an Assent intended in Law; for Presumptions of Law stand as strong till the contrary appears, as an express Declaration of the party.

Memorand. Anno quarto Willielmi & Mariz, this Case was brought by writ of Error into the House of Lords, and the Judgment was there Reversed upon the Reasons in the foregoing Argument.

Termino

Termino Sancti Michaelis, Anno 2 W. & M.
In Communi Banco.

Coghill *versus* Freelove.

IN an Action of Debt for Rent the Plaintiff Declared for 78 l. upon three several Demises against the Defendant, as Administratrix to Thomas Freelove her late Husband in the Detinet.

The Defendant pleaded, that after the Letters of Administration granted to her, and before the Rent became due, she assigned to Samuel Freelove the Indenture of Demise, and all her Estate and Interest in the Premises; and that Samuel entered and was possessed, and that the Plaintiff had notice of the Assignment before the Action brought.

To this the Plaintiff Demurs.

It was said for the Plaintiff, that the Action being brought in the Detinet, the Assignment was no Plea; for the Administratrix is charged upon the Contract of the Intestate, and liable (so far as there is Assets) tho' there be no Assignment. And tho' in the 3 Co. and in the 1 Cro. 555. Overton and Syddal's Case seems the contrary; and so Marrow and Turpin's Case in the 1 Cro. 715. And that the pivity of Contract is determined by the Death of the Lessee, yet in Ironmonger and Newsam's Case in Latch 260. the contrary was Resolved. (Note, it did not appear by Latch to be Resolved; but the Chief Justice said it was so Resolved) So in 17 Car. 2. Syderfin 266. in Heylar and Casbord's Case it was Resolved, that the Action lay against the Executor upon the Contract, after an Assignment; where it was held also, that an Executor cannot waive a Term, unless he renounceth the whole Executorship.

After hearing Arguments at the Bar, the Court gave Judgment for the Plaintiff, (Powell absente.) As to Overton and Syddal's Case, it appears by Mo. 352. that Popham and Fenner were against Gawdy and Clench, vide Poph.Rep. 121.

It appears that the Action was brought in the Debet and Detinet, and by a Prebend upon the Lease of his Predecessor, and then an Assignment will be a Bar; which matters indeed do not appear to be urged in the Case, as Cited by my Lord Coke, and Reported by Cro.Eliz. 355. But they go upon the pivity of Contract, said to be dissolved by the Death of the Lessee. Sed vid. Latch. 261. that Case said not to be Resolved, as cited by Co. and

and so Noy's Rep. 77. And so Marrow and Turpin's Case there is an acceptance of the Rent of the Assignee pleaded, as appears by 1 Cro. 715. tho' that doth not appear to be insisted on by the Books which Report the Case; however the latter Authorities are clear, that the Action lies in the Detinet after an Assignment, as appears by the Cases cited. *Judicium pro Quer.*

Note, The Court was moved upon the Case of Persons Outlawed upon Mein Process before the late Act of General Pardon, 2 Willielmi & Mariae, it being provided by the said Act, That no Process of Outlawry, at the Suit of any Plaintiff, shall be stayed or avoided, unless the Defendant appears and puts in Bail (where by Law Bail is necessary) and takes forth a Writ of *Scire facias* against the party at whose Suit he was Outlawed.

Whether the Defendant, before he can have the benefit of this Pardon, must pay the Costs to the Plaintiff of the Outlawry; there being no mention of any thing, but his appearing and putting in of Bail?

The Court were of Opinion, that he must pay the Costs, and to take the Act otherwise would be a great prejudice to the Plaintiff, who did no wrong.

And Pollexfen Chief Justice said, that the Practice had been so upon the General Act of Pardon, 25 Car. 2. cap. 5. and yet in that Statute the Clause concerning Outlawries is to the same purpose, and no mention made of the Costs of the party.

Denny versus Mazezy.

Replevin.

Effet' ff. **S**IMON MAZEY nuper de Bocking in Com' prædict' Clothier suū fuit ad respondend' Samueli Denney de placito quare cepit un' Equul' ipsius Samuelis & eum injuste detinuit contra vados & pleg' &c. Et unde idem Samuel per Johannem Meriton Attorn' suum queritur quod prædict' Simo vicesimo sexto die Septembris anno regni domini & dominæ Regis & Reginae nunc primo apud Bocking in quodam loco ibidem (vocat' Townfield) cepit un' Equul' nigr' (Anglice Black Horse Colt) ipsius Samuelis & eum injuste detinuit contra vad' & pleg' quousque &c. unde dic' quod deteriorat' est & dampn' habet ad valenciam decem librarum Et inde produc' sectam &c.

*Avowry per
Damage/tenant.*

Et prædict' Simo per Stephan' Hales Attorn' suum ven' & defend' vim & injur' quando &c. Et bene advocat capconem Equuli prædict' in prædicto loco in quo &c. Et juste &c. quia dic' quod ante prædict' tempus quo supponitur capconem Equuli prædicti quardam Elizabetha Mann Vid' fuit seisir' de prædict' loco in quo &c. in dominico suo ut de feodo Et sic seisir' existen' prædicta Elizabetha

*g.s. seised in
fee.*

Elizabetha ante prædict' tempus quo &c. scilicet vicesimo die Septembris anno regni domini & dominæ Regis & Reginæ nunc primo apud Bocking præd' dimisit eidem Simoni locum præd' in quo &c. habend' & occupand' eidem Simoni abinde per spacium unius anni tunc prox' sequen' & sic de anno in annum quamdiu ambabus partibus placuer' Virtute ejus dimissionis Idem Simo postea & ante præd' tempus quo &c. scilicet vicesimo primo die ejusdem mensis Septembr' in prædicto loco intravit & fuit inde possessionat' Ipsoque Simone sic inde possessionat' existen' quia Equul' prædict' prædicto tempore quo &c. fuit in prædicto loco in quo &c. herbam suam ibidem tunc crescen' depascen' & dampn' ibidem facien' Idem Simo bene advocat capconem Equuli præd' in prædicto loco in quo &c. Et juste &c. dampn' ibidem sic, facien' Et hoc parat' est verificare unde pet' Judic' & retorn' præd' Equuli una cum dampnis mis' & custag' suis in hac parte appoit' juxta formam Statuti in hujusmodi casu edit' & provis' sibi adjudicari &c.

Et prædict' Samuel die' quod prædict' Simo ratione præallegata capconem Equuli præd' in prædicto loco in quo &c. justam advocare non debet quia die' quod prædicta Elizabetha Mann Vid' ante præd' tempus quo &c. fuit & adhuc est seisit' de præd' Clauso in quo &c. cum pertin' int' alia in dominico suo ut de feodo Et sic inde seisit' existen' eadem Elizabetha ante præd' tempus quo &c. scilicet quinto die Junij anno regni dictorum domini Regis & dominæ Reginæ nunc primo supradicto apud Bocking præd' dimisit præfat' Samueli idem Clausum cum pertin' in quo &c. inter alia habend' à secundo die Marcij tunc ult' præterit' pro sex annis ab eodem secundo die Marcij prox' sequen' Virtute ejus dimissionis idem Samuel ante prædict' tempus quo &c. in Clausum illud in quo &c. inter alia intravit & fuit & adhuc existit inde possessionat' Et sic inde possessionat' existen' idem Samuel ante præd' tempus quo &c. posuit Equul' præd' in idem Clausum in quo &c. ad herbam ibidem tunc crescen' depascend' Et Equulus ille prædicto tempore quo &c. fuit in eodem Clauso in quo &c. Herbam ibidem tunc crescen' depascen' quousque prædictus Simo prædicto vicesimo sexto die Septembris anno primo supradicto apud Bocking præd' in prædicto Clauso (vocat' Townfield) cepit Equulum illum Et cum injuste detinuit contra vad' & pleg' quousque &c. prout ipse idem Samuel superius versus eum queritur Absque hoc quod prædict' Elizabetha Mann dimisit præd' Simoni prædict' loc' in quo &c. modo & forma prout præd' Simo per advocat' suum præd' superius supponit. Et hoc parat' est verificare unde ex quo præd' Simo capconem Equuli prædicti in prædicto Clauso in quo &c. superius cogn' idem Samuel pet' Judicium & dampna sua occone capconis & injuste detenconis Equuli illius sibi adjudicari &c.

And demised to the Avowant as Will.

The Avowant entered and was possessed.

And took the Colt damage feazant.

Prays Judgment and a Return.

And Costs and Damages, according to the Statute. The Plaintiff pleads in Bar to the Avowry, that J. S. demised to him, and traverses the Demise to the Avowant. Confessing of the seisin Fee. Demise to the Plaintiff. For six years.

The Plaintiff entered and was possessed.

And the Defendant took his Colt therof.

Alsquo hoc that J. S. demised to the Avowant modo & forma, as he hath set forth in his Avowry.

Petit judicium & dampna, &c.

Demurter to
the Plea.

Et prædict' Simo dic' quod præd' placitum prædict' Samuel superius replicand' placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipm Samuel' acconem præd' versus eum habend' manutenend' quodque ipse ad placitum illud modo & forma pd' replicand' placitat' necesse non habet nec per legem terræ tenetur aliquo modo respondere Et hoc parat' est verificare unde per' Judicium si præd' Samuel acconem suam præd' inde versus eum habere debeat &c.

Joynder in
Demurter.

Et prædict' Samuel ex quo ipse sufficien' materiam in lege in replicacone in sua prædicta ad acconem suam præd' versus præfat' Simonem habend' manutenend' superius allegavit quam ipse parat' est verificare Quam quidem materiam idem Simo non dedic' nec ad ill' aliqualit' responder set verificacon' ill' admittere omnino recusat Idem Samuel ut prius per' Judicium & dampna sua occone capconis & injuste detenconis Equuli illius sibi adjudicari &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judicium inde reddant dies dat' est partibus prædictis hucusque— ad audiend' inde Judicio suo eo quod iidem Justic' hic inde nondum &c.

Denney versus Mazey.

In a Replevin the Plaintiff Declared of taking of his Horse Cole at S. in quodam loco vocat' Townsfield.

The Defendant saith, that befoze the Taking one Elizabeth Mann was seised in fee de prædicto loco in quo, &c. and 20 Septemb. Anno primo Willielmi & Mariæ demised the Premises to him for a year then next ensuing, and that he entred, and avowed the taking of the Plaintiffs Horse damage feasant.

The Plaintiff Replied, that the said Elizabeth Mann was seised of the Premises in fee, and befoze the Lease to the Avowant, (viz.) the 5th of June, in the said first year of the King and Queen, she demised to the Plaintiff the Premises habend' from the second day of March then last past for the Term of six years; by virtue of which he entred, and put his Horse into the Premises, and traverseth the Lease made to the Avowant.

To this the Avowant Demurred generally.

Pollexfen Chief Justice Inclined, that the Traverse was no cause of Demurter, tho' it might have been omitted. He said there were divers Authorities against Heylar's Case in the 6 Co. which is Reported to the same effect in Mo. 551. 1 Cro. 658. as 1 Cro. 754. Cover's Case; and the Books generally are only, that there need be no Traverse, as the Bishop of Salisbury and Hunt in 3 Cro. 581. and Kellend and White, 3 Cro. 494. the other Justices doubted, relpyng upon the Authoity of Heylar's Case, and Rice and Harveston's Case, 2 Cro. 299. and Yelv. 221. where 'tis said, that such a Traverse

Hob. 81. 103.
Traverse, where
the Matter is
confessed and
avoided.

Traverse makes the Plea vitious, Vid. Mo. 557. But here the Demurrer being General, 'tis but matter of form, and clearly aided by the Statute of 27 Eliz. where if one Confess, and Avoid, and Traverse, 'tis in nature of a Double Plea. Vid. That it is good upon a General Demurrer, Edwards and Woodden, 3 Cro. 323. So Judgment was by the whole Court given for the Plaintiff.

Woodward *versus* Fox.

Quod vide ante ultimo Termino.

The Case was this Term Argued again by Serjeant Pemberton for the Defendant, and by Serjeant Powell for the Plaintiff; upon the Point, Whether the Nomination to the Office, being forfeited by the Statute of Ed. 6. it did belong to the King or the Bishop (in whose Diocess the Archdeaconsry was) to make the Register?

But Pollexfen, Chief Justice, desired them to Consider, Whether the King (admitting he had a right by the Statute) could grant this Office of the Register, before Office found of the Forfeiture?

Note, In case of Simony the Presentation vests in the King without Office. Adjoinatur.

Morgan *versus* Hunt.

In Covenant the Plaintiff Declared, that the Defendant Let to him a certain House and Lands, and Covenanted that he should quietly and peaceably enjoy it, without any manner of interruption, molestation or disturbance; and that by virtue of the said Demise he entered, and sometime after the Defendant exhibited a Bill against the Plaintiff in the Court of Chancery, wherein he charged the Plaintiff with ploughing up Meadows, and the committing of divers Wastes; and did obtain an Injunction out of the said Court against the Plaintiff, whereby he was interrupted in his Ploughing, &c. and that afterwards the said Bill was dismissed with 20 l. Costs, and so the Defendant had broken his Covenant.

After a Verdict for the Plaintiff (I know not upon what Issue) it was moved in Arrest of Judgment:

First, That here was no sufficient Breach set forth. It was said, that the Law does not take notice of Proceedings in Chancery, Poph. 205. it is said, If one be possessed of Lands by Extent, and by a Decree in a Court of Equity he is forced to pay a Rent out

out of the Lands, this shall not be a legal Eviction or Recovery for so much.

Secondly, The Suit in Chancery here is not touching the Lessee's Estate or Title, but for Waste, which he ought not to do; and tho' the Suit might be groundless, yet it not relating to his Title or Possession, was no breach of Covenant.

The Judgment was stayed by the Opinion of the whole Court, for the last Reason; for this was no interruption or disturbance within the Covenant, the Subject matter of the Suit being for Waste.

But the Court will take notice of a Suit in Chancery; and 1 Cro. 768. an Assumpsit in Consideration of desisting from exhibiting a Bill in Chancery was held a good Consideration.

Anonymus.

In a Covenant, That the Defendant should keep in good Repair the House, Outhouses and Stables; and the Breach assigned, was that the Defendant had permitted the Racks in the Stable to be in Decay.

After Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff had not set forth that the Racks were fixed in the Stable, and so part of the Freehold; for they might be in the Stable and yet loose.

Pollexfen, Chief Justice, was of Opinion, that it ought to have been shewn in the Declaration, that the Racks were set up and fixed.

But the other Justices conceived, that it should be intended that they were Racks fixed for use in the Stable; and it would be very remote to give it any other Construction. And so Judgment was given for the Plaintiff.

Anonymus.

In an Ejectment it was moved in Arrest of Judgment, that the Plaintiff had declared of two Demises, (viz.) That J. S. demised 10 Acres of Land to him, and that J. N. had demised 10 other Acres of Land to him *habend'* for the Term of Five years, &c. and that he entred into the Premises demised to him by J. S. and J. N. *in forma prædict'*.

After Verdict, upon Not guilty for the Plaintiff, it was Objected, That in one of the Demises there is no certain Term or Estate; for the *habend'* can be referred only to the Demise of J. S. for that begins a New sentence.

But

But the Court held, that the Habend' should be a good Limita-
tion of both Demises for five years; and when 'tis shewn, that
the Plaintiff entered into the Premises demised to him in forma
prædict', that is an Averment that all was demised for five
years, for that is the forma præd'; As Lands lett to A. for his life,
Remainder to B. in forma præd', this is an Estate to B. for Life.
And so Judgment was given for the Plaintiff.

Anonymus.

In an Action upon the Statute of Hue and Cry, it was after
Verdict moved in Arrest of Judgment, that in the Recital of
the Statute there were Variances from the Statute and Omis-
sions.

First, There was no mention of Burning of Houses in the Recital;
but that is in the Statute.

Non allocatur: for 'tis not necessary to set forth more in the
Declaration than is pertinent to the Action.

Secondly, The Statute is, That the Country should answer for
the Bodies of the Malefactors; and the Recital is, Quod patria
respondeat p Malefactoribus, the sense of which is, That the Coun-
try should stand in their stead; whereas the meaning of the Sta-
tute is, That they should produce their Persons.

Sed non allocatur: for as it is in the Recital of the Declaration
it well answers the sense of the Statute.

Anonymus.

In an Action of Trespass, quare Clausum fregit, and digging up
and carrying away of his Trees.

It appeared upon the Evidence, That the Defendant had entered
into the Plaintiffs Close, and digged up several Roots of his Trees,
and removed them to a place on the same Ground, about two yards
distance off.

And the Question was, Whether this were such a Carrying
away, as that the Plaintiff should have full Costs, or only Costs
according to the late Statute, where the Damages are under 40 s.
as was in this Case?

Pollexfen Chief Justice and Rokeby (Powell absente) were of
Opinion, that the Plaintiff was to have full Costs, because the
Roots were carried from the place where they were digged, tho'
not removed off from the Ground; and they said, that it had
been adjudged Felony to take and remove things with an intent to
steal them, tho' laid at a small distance from the place, and not
carried out of the House; or the like.

Ventris

Ventris conceived, That the taking of the Roots and laying them a little way off in the same man's Ground, could not be taken as an asportavit, and it differed from the Case of Stealing; for taking Goods as a Thief is the Felony, and it doth not lye in the carrying them off, but in the Felonious intent in the taking.

But by the Opinion of the other two the Plaintiff had his full Costs.

Anonymus.

It was moved for a Prohibition to the Ecclesiastical Court, to stay a Suit for Dilapidations, by the Successor against the Executor of the former Incumbent, upon the late General Act of Pardon; for that all Suits for Offences of Incest, Simony, or Dilapidations, are excepted in the Act, unless commenced and depending before such a Day, (viz.) the 20th Day of March last; and this Suit was commenced since.

The whole Court, upon Hearing of Counsel at the Bar and Consideration of the Matter, conceived, that the Parliament never intended to take away the Successors Remedy for Dilapidations; for that would be to ease the Executor of the last Incumbent, who was the Wrong-doer, and translate the Charge to the Successor: But they would intend this Exception of such Suits as might be in the Ecclesiastical Court ex Officio against the Dilapidator himself, to punish it as a Crime against the Ecclesiastical Law, and to pardon it, unless there were Prosecution before the Day aforesaid. And so the Prohibition was denied.

Nota, If a Sheriff of a County in a City be in Contempt, the Attachment is to go to the Coroner, and not to the Mayor or Chief Officer of the Corporation in such City or Town: And if the Offender be out of his Office, the Attachment shall be directed to the New Sheriff.

Gawden *versus* Draper.

IN an Action of Covenant the Plaintiff declared upon a Deed of Covenant by Indenture, made between the Defendant and him, whereby the Defendant Covenanted with the Plaintiff, That Sarah (Wife of the Defendant) should be permitted to live separate from the Defendant, until the Defendant and the said Sarah by Writing under their several Hands, attested by two Witnesses, should give notice to each other, that they would again Cohabit, And further Covenanted, That he the Defendant, during the Coverture, and until such Notice should be given of their desires to Cohabit, as aforesaid, would pay to the Plaintiff, for the Maintenance of the said Sarah, 300 l. per Annum at four Quarterly payments; and sets forth, That the said Sarah, from the Date of the said Indenture to the time of the said Suit, did live separate from the Defendant, and no notice of Cohabitation, as aforesaid, had been given during that time of either side: And for 75 l. for one Quarters payment of the said 300 l. which was to be paid at our Lady-day last the Action is brought.

The Defendant pleads in Bar, That after the Indenture aforesaid, and before the Action brought, another Indenture was made between the Defendant and the said Sarah his Wife, of the one part, and the Plaintiff of the other part, which the Defendant *proferre hic in Cur'* reciting the said first Indenture; and further reciting, That the Defendant and the said Sarah did then intend to Cohabit, and did at that time Cohabit, and expressing that it was the true intent and meaning of all the said parties to the said Indenture produced, *ut supra*, by the Defendant, That so long as the Defendant and the said Sarah should agree to Cohabit, the said Annual payment should cease. And the Plaintiff did by the said last mentioned Indenture, by the appointment of the said Sarah, as appointed by her, being party thereunto, and her Signing, Sealing and Delivery thereof, covenant and agree with the Defendant, That so long as the Defendant and the said Sarah should Cohabit, he should be saved harmless from the said 300 l. Annual payment; and that it should be lawful for him (during such Cohabitation) to detain the same, *ut per dictam Indenturam plenius apparet*, and averreth; That ever since the last mentioned Indenture they did Cohabit, and demands Judgment of the Action.

The Plaintiff Replies, That they did not Cohabit modo & forma prout the Defendant placitando allegavit, & hoc petit quod inquirat, &c. And to that the Defendant Demurred.

Birch Serjeant, Argued for the Defendant, That this latter Indenture, which sets forth a mutual Agreement to Cohabit, and that they did Cohabit, which is alledged in the Bar, and confessed by the Demurrer, had dispensed with those Circumstances, (viz) A Writing mutually Subscribed, attested by two Witnesses, giving Notice of each parties Intention so to Cohabit; and this Covenant, That it should be lawful for the Defendant to detain the same so long as such Cohabitation should continue, as is therein mentioned, might well be pleaded in Bar to the Action brought upon the first Indenture.

But by the Opinion of the whole Court Judgment was given for the Plaintiff; for they held, that unless the Cohabitation had been according to the first Indenture, it was no Bar; for the last Deed had not taken away the effect of the former, a latter Covenant cannot be pleaded in Bar of a former. But the Defendant must bring his Action upon the last Indenture, if he would help himself.

Anonymus.

A Fieri facias was taken out, which was executed after the party was Dead upon the Goods in the hands of the Executor; but the Teste was before his death. But it appeared, that the Delivery to the Sheriffs, and Endowment thereupon, according to the New Statute of 29. Car. 2. was after his Death.

The Court held, that at the Common Law the Execution had been clearly good: But the Statute is, that the property of the Goods shall be bound but from the delivery of the Writ to the Sheriff.

And the Court rather inclined, that the Execution was good, and that the Statute was made for the benefit of Strangers, who might have a Title to the Goods between the Teste of the Writ of Execution, and the time of the delivery thereof to the Sheriff. But as to the party himself, the Goods were bound from the Teste ever since the Statute of Vicesimo nono Car. 2. But it was Ordered to be further spoken to.

Watmough

Watmough *versus* Holgate.

Eborum ff. **W**ILLIELMUS HOLGATE nuper de Sawley in Com. prædict' *Deoman* alias dictus Williel' Holgate de Sawley in Com' Eborum *Deoman* suū fuit ad respondend' Roberto Watmough Radulpho Duxbury & Willelmo Swire de placito quod reddat eis quadraginta libras quas eis debet & injuste detinet &c. Et unde ijdem Robertus Radulphus & Willielmus Swire per Robertum Scater Attorn' suum dic' quod cum prædict' Willielmus Holgate secundo die Augusti anno regni domini Regis Jacobi secundi Angl' &c. quarto apud Gisborne per quoddam scriptum suum obligatorium concessisset se teneri præfat' Roberto Radulpho & Willelmo Swire in prædictis quadraginta libris solvend' eisdem Roberto Radulpho & Willelmo Swire cum inde requisit' fuisset præd' tamen Willielmus Holgate licet sæpius requisit' prædict' quadraginta libras eisdem Roberto Radulpho & Willelmo Swire nondum reddidit set ill' ei hucusque reddere contradixit & adhuc contradicit unde dic' quod deteriorat' sunt & dampn' habent ad valenciam viginti librar'. Et inde produc' sectam &c. Et proferunt hic in Cur' scriptum prædict' quod debitum prædict' in forma prædicta testatur ejus dat' est die & anno supradicto &c.

Debt upon a Bond.

Et prædictus Willielmus Holgate per Johannem Mitchel Attorn' suum ven' & defend' vim & injur' quando &c. Et per' auditum scripti prædicti & ei legitur &c. petit etiam auditum Condicionis ejuldem scripti & ei legitur in hæc verba ff. *The Condition of this Obligation is such; That if the above-bounden William Holgate, his Heirs, Executors and Administrators, for his and their parts and behalves, shall and do in all things well and truly stand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End and Determination of Ambrose Pudsey of Colton Esquire, and Thomas Parker of Crouseholme Esquire, Arbitrators indifferently elected and named, as well on the part and behalf of the above-bounden William Holgate, as of the above-named Robert, Ralph and William Swire, to arbitrate, award, order, judge and determine, of and concerning all and all manner of Action and Actions, Cause and Causes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controversies, Trespasses, Damages and Demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending, by or between the said parties, so as the said Award be made and put into writing, and ready to be delivered to the parties in difference, or such of them as shall desire the same, on or before the Eleventh day of November next, then this Obligation to be void, or else to stand in*

The Defendant craves Oyer of the Condition.

Which is for the performance of an Award.

The Defendant
pleads, That
the Arbitrators
made no
Award.

forte. Quibus lectis & auditis idem Willielmus Holgate dic' quod prædict' Robertus Radulphus & Willielmus Swire acconem suam præd' inde versus eum habere non debent quia dic' quod prædict' Ambrosius Pudsey & Thomas Parker Arbitratores prædict' post consecconem scripti prædicti ad vel ante prædict' undecim' diem Novembr' in Condicone scripti prædicti menconat' nullum fecer' arbitrium int' partes prædict' in Condicone prædict' superius menconat' de & in præmissis in Condicone prædict' superius spec'. Et hoc parat' est verificare unde pet' Judic' si prædict' Robertus Radulphus & Willielmus Swire acconem suam prædict' inde versus eum habere debeant &c.

The Plaintiff
Replica, and
sets forth the
Award.

Et prædict' Robertus Radulphus & Willielm' Swire dic' quod ipsi per aliqua per præfat' Willielm' Holgate superius placitando allegat' ab accone sua prædicta versus eum habend' præcludi non debent Quia dic' quod prædicti Ambrosius Pudsey & Thomas Parker Arbitratores in Condicone prædict' superius nominat' accepitis super se onera arbitrandi int' partes prædict' de & super præmissis in Condicone prædicta superius menconat' post consecconem scripti prædicti & ante prædict' undecimum diem Novembr' in Condicone prædicta superius spec' scilicet decimo die Novembr' anno regni domini Jacobi secundi nuper Regis Angl' quarto apud Gisborne prædict' fecer' quoddam arbitrium suum in scriptis sub manibus & sigillis suis de & super præmissis prædictis ad tunc & ibidem partibus præd' parat' fore deliberand' per quod quidem arbitrium iidem Arbitratores arbitraver' & ordinaver' de & super præmissis in Condicone prædicta superius spec' modo & forma sequen' videlicet quod prædict' Willielmus Holgate bene & veracit' solveret seu solvi causaret eisdem Roberto War-mough Radulpho Duxbury & Willielmo Swire vel eorum alicui summam quindecim librar' legalis monet Angl' ad vel ante prim' diem Decembr' tunc prox' sequen' qui Arbitratores prædict' judicayer' prædict' Robertum Radulphum & Willielmum Swire sustinuisse in custag' & dampnis ratione cujusdam sectæ sine causa per dict' Willielmum Holgate versus ipsos Robertum Radulphum & Willielm' Swire prosecut' Et ulterius Arbitratores prædict' ordinaver' quod omnes sectæ & differenciæ inter dict' Willielm' Holgate ex una parte & ipsos dictos Robertum Radulphum & Willielmum Swire ex altera parte quæ mot' habit' sive depend' fuer' ante diem dat' scripti Obligatorij prædicti absolut' cessarent vacuæ forent & determinarentur prout per idem arbitrium inter alia plenius liquet & apparet Et prædict' Robertus Radulphus & Willielmus Swire protestando quod prædict' Willielmus Holgate non observavit performavit perimplevit seu custodivit aliquod in arbitrio prædicto superius spec' ex parte ipsius Willielmi Holgate observand' performand' perimplend' seu custodiend' In facto iidem Robertus Radulphus & Willielmus Swire dicunt quod prædict' Willielmus Holgate non solvit prædict' Roberto Radulpho & Willielmo Swire vel eorum alicui summam quindecim

The Award
made in
Writing.

That all Suits
should cease.

A breach of
Non-payment
assigned in the
Award.

decim librarum super prædict' primum diem Decembre tunc prox' sequen' dat' arbitrij præd' quas eis vel eorum alicui super eundem diem solvisse debuit secundum formam & effectum arbitrij prædict' Et hoc parat' sunt verificare unde per' Judic' & debitum suum præd' unacum dampnis suis occasione detentionis debiti illius sibi adjudicari &c.

Et prædict' Willielmus Holgate dic' quod placitum præd' prædict' Roberti Radulphi & Willielmi Swire modo & forma superius replicand' placitat' minus sufficien' in lege existit ad prædict' Robertum Radulphum & Willielmum Swire ad acconem suam præd' versus ipsi Willielmum Holgate habend' manutenend' quodque ipse ad replicationem illam modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' replicationis in hac parte Idem Willielmum Holgate per' Judic' & quod præd' Robertus Radulphus & Willielm' Swire ab accone sua prædicta versus cum habend' præcludantur &c.

The Defendant
Demurs.

Et præd' Robertus Radulphus & Willielm' Swire ex quo ipsi sufficien' materiam in lege ad acconem suam præd' versus præfat' Willielmum Holgate habend' manutenend' superius replicando allegaver' quam ipsi parat' sunt verificare Quam quidem materiam prædict' Willielm' Holgate non dedic' nec ad eam aliquant' responder sed verificationem illam admittere omnino recusavit iidem Robertus Radulphus & Willielm' Swire ut prius per' Judic' & debitum suum præd' unacum dampnis suis occasione detentionis debiti illius eis adjudicari &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judic' suum inde reddant dies dat' est partibus prædict' hic ulque à die Sancti Michaelis in un' mensem de audiendo inde Judicio suo eo quod iidem Justic' hic inde nondum &c.

The Plaintiff
joins in Demurrer.

Watmough versus Holgate & al.

An Action of Debt upon a Bond of 40 l. The Condition was to perform an Award to be made of all Matters between them.

The Defendant pleaded no Award made.

The Plaintiff Replied, and set forth an Award to have been made de præmissis, (viz.) That the Defendant should pay to the Plaintiff 15 l. at or before the first day of December then next ensuing, which the Arbitrator did judge the Plaintiff to have sustained in Costs and Damages, by reason of a Suit without Cause commenced by the Defendant against the now Plaintiff.

And

And further the Award was, That all Suits and Differences between the said parties, which were depending before the Date of the Bond should cease and determine; and in factio dicit, that the Defendant had not paid the said 15 l. upon the 1st day of December in the said Award mentioned.

And to this the Defendant Demurred.

It was Argued, first, That this Award was all of one side; for it doth not appear that there was any Difference between the parties, save the Suit upon which the Costs are awarded, (viz.) 15 l. and that was the Suit of the now Defendant; and what benefit hath he by staying his own Suit, and paying 15 l. for Costs?

Secondly, He assigns the Breach, that the 15 l. was not paid upon the 1st day of December, so it might be paid before; and the Award is to pay it ad vel ante primum diem Decembris.

It was Answered to the first, That there might be well intended other Differences, tho' not set forth.

Again, For ought appears, the Plaintiff in the Action mentioned in the Award might be subject to have Costs taxed at the prosecution of the then Defendant, whereas this Award stops the Defendant from applying to the Court for Costs.

As to the second, If Issue be taken upon solvit ad diem, payment before the Day maintains the Issue.

The Court inclined, that the Award was good. Sed Adjornatur.

Humphreys *versus* Bethily.

Quod vide ante ultimo Termino.

The Court now delivered their Opinions, That the Doubtfulness in the Declaration was cured by Answering, and no Exception can be taken to it upon the General Demurrer. And the Case in the 1 Roll. Rep. 112. Sanders and Crowley is the same with this. *Judicium pro Quer.*

The

The Lord Lexington *versus* Clarke and his Wife.

Trin. 1 Willielmi & Mariæ Rot. 1539.

IN an Assumpsit the Plaintiff sets forth, That the 25th of March 1685. he had Demised to William Brady, the former Husband of the now Defendants Wife, divers Lands at the Rent of 320 l. per Annum to hold at Will, and that there was due from the said Brady 160 l. for Half a years Rent, and that he died possessed of the Premises, and that the Wife of the now Defendant, while she was sole, and soon after the death of the said Brady her late Husband, in Consideration that the Plaintiff would permit her to hold and enjoy the Premises till our Lady-day next ensuing the decease of her said Husband, and permit her to remove divers Posts, Rails and other things, fixed and placed upon the Premises by her said Husband, did promise to the Plaintiff, That she as well the aforesaid 160 l. that then was in arrear (as aforesaid) in the life of her said late Husband, as also 260 l. more, would well and truly pay; and shews, that she did enjoy the said Premises by the permission of the Plaintiff till Lady-day aforesaid: And that he suffered her also to take away the things before-mentioned: yet she, when she was sole, nor the Defendant or she, since her Marriage, did not pay the said Sums of Money, or any part of them, &c.

Upon Non Assumpsit pleaded, a special Verdict was found,

That the Defendants Wife did make the Promise prout, and that she enjoyed the Lands, and took away the Posts, &c. as in the Declaration is set forth; and that since she had paid the 160 l. to the Plaintiff; but had not paid the 260 l. or any part thereof; and they find, that the said Promise, nor any Memorandum or Note thereof, was not put into Writing, or signed by the Wife of the Defendant, or any person authorized by her to do it; and they find, that she paid the 160 l. before the Action brought; and they find the Act of Parliament in 29 Car. 2. against Frauds and Perjuries; whereby it is Enacted, That no Action should be brought to charge an Executor or Administrator upon any special Promise to answer of his own Estate, or upon any Promise to answer for the Debt, Default or Mis carriage of any other person, &c. unless the Agreement, or some Memorandum or Note thereof, were by the person, or some other empower'd by him, put into Writing, signed, &c. prout in Statute; and made the General Conclusion.

It was Argued for the Plaintiff, that altho' as to the payment of the 160 l. which was the Debt of her the Defendants late Husband, the Promise might be void in regard it was not in Writing, according to the said Statute; yet as to the payment of the 260 l. the Promise is not within the Statute, for that is upon a good Consideration, and her own proper Debt and Damages are only given; for that the 160 l. is found to have been paid.

But by the Opinion of all the Court Judgment was given for the Defendant; for the Promise as to one part being void, it cannot stand good for the other: for 'tis an entire Agreement, and the Action is brought for both the Sums, and indeed could not be otherwise, without variance from the Promise.

Note, It did not appear by the Record that the Wife was Executrix or Administratrix to her former Husband.

Kemp *versus* Cory & al'.

Replevin.

Tres Juvencae,
& unam Equu-
lam.

Avowry and
Conuzance for
Rent by the
Heir of the
Lessor, upon a
Lease of a
Third part of
a Farm for 99
years, if A.B.
& C. or either
of them shall
so long live.
The Avowants
Father seised in
Fee of a Third
part of a
Messuage, &c.

Cornub' ff. JOHANNES CORY nuper de West-Putford in Com' Devon' gen' Johannes Cocke nuper de ead' Peoman & Willielmus Cocke nuper de Launceston in Com' Cornub' præd' Peoman suū fuer' ad respondend' Willielm' Kempe Edwardo Laundry & Edwardo Cheapman de placito quare ceperunt averia ipsorum Willielmi Kempe Edwardi Laundry & Edwardi Cheapman & ea injuste detinuer' contra vad' & pleg' &c. Et unde iidem Willielmus Kempe Edwardus Laundry & Edwardus Cheapman per Willielmum Crowne Attorn' suum queruntur quod prædict' Johannes Cory Johannes Cocke & Willielmus Cocke decimo nono die Junij anno regni domini Regis & dominæ Reginæ nunc primo apud Blisland in quodam loco ibidem (vocat' ~~Studdert~~ **Bladder Park**) ceper' averia videlicet tres Juvencae quatuor Juvencae & unam Equulam ipsorum Willielmi Kempe Edwardi Laundry & Edwardi Cheapman & ea injuste detinuer' contra vad' & pleg' quousque &c. Unde dic' quod deteriorat' sunt Et dampn' habent ad valenciam decem librarum Et inde pduc' sectam &c.

Et præd' Johannes Cory Johannes Cocke & Willielmus Cocke per Thomam Horwell Attorn' suum ven' & defend' vim & injuriam quando &c. Et idem Johannes Cory in jure suo pprio bene advocat & præd' Johannes Cocke & Willielmus ut Ballivi præd' Johannis Cory bene cogn' capconem averiorum prædictorum in præd' loco in quo &c. Et iuste &c. quia dic' quod idem locus in quo supponitur capconem averiorum illorum fieri continet & præd' tempore quo supponitur capconem averiorum illorum fieri continebat in se viginti acras terræ cum pertin' in Blisland prædict' quodque diu ante præd' tempus quo &c. Quidam Johannes Cory gen' pater præd' Johannis Cory modo Advocat' fuit seisir' in dominico suo ut de feodo de & in tercia parte cujusdam messuagij & tenementi (vocat' **Crewint** in **Blisland**)

Blisland) præd' unde præd' viginti acra terræ in quibus &c. sunt & præd' tempore quo &c. Necnon à tempore cuius contrarii memoria hominum non existit fuer' parcell' prædictoque Johanne Cory patre sic inde seisit' existen' ipse idem Johannes Cory pater ante prædict' tempus quo &c. scilicet tricesimo die Septembris anno regni domini Caroli secundi nuper Regis Angl' decimo nono apud Blisland præd' dimisit & ad firmam tradidit cuidam Jacobo Robyns Executoribus Administratoribus & Assign' suis præd' terciam partem præd' mesuagij & tenementi (vocat' Trewint) scituat' jacen' & existen' infra paroch' de Blisland alias Bliston in Com' Cornub' & nuper in tenura & occupacone Johanne Smith Vid' assign' vel assign' ejus habend' & tenend' præd' Jacobo Robyns Executoribus Administratoribus & Assign' suis p & duran' pleno tempore & Termino nonaginta & novem annorum tunc prox' sequen' plenar' complend' & finiend' si Thomasina Robyns & Maria Robyns filie præd' Jacobi Robyns ac Johannes Robyns filius Roberti Robyns gen' defunct' fratris præd' Jacobi Robyns vel aliquis vel alter eorum tam diu vivere contingeret Reddend' & solvend' proinde annuatim durante dicto Termino præd' Johanni Cory patri hæredibus & assign' suis annual' reddit' vel summam triginta & trium solidorum & quatuor denar' legalis monet' Angl' ad quatuor Festa vel dies soluconis reddit' in anno maxime usual' videlicet Natalis Domini Dei Annunciaconis Beatæ Mariæ Virginis Nativitatis sancti Johannis Baptistæ & Festi sancti Michaelis Archi per æquas & æquales porcones fore dividend' & solvend' durante dicto Termino Virtute cuius dimissionis præd' Jacobus Robyns in prædictam terciam partem tenementorum prædictorum cum pertin' intravit & fuit inde possessionat' prædictoque Jacobo de prædicta tercia parte tenementorum prædictorum cum pertin' possessionat' existen' ac præd' Johanne Cory patre se revercone inde sic ut præfertur seisit' existen' idem Johannes Cory pater postea & ante præd' tempus quo &c. apud paroch' de Blisland præd' de revercone præd' terciae partis tenementorum prædictorum cum pertin' unde &c. obiit inde seisit' per quod reverco præd' terciae partis tenementorum prædictorum cum pertin' unde &c. descendebat præd' Johanni Cory modo Advocan' ut filio & hæredi præd' Johannis Cory patris per quod idem Johannes Cory modo advocan' fuit & adhuc est de revercone præd' terciae partis tenementorum prædictorum cum pertin' unde &c. seisit' Et quia tres libr' sex solid' & octo denar' de præd' reddit' triginta & trium solidor' & quatuor denar' pro duobus annis finitis ad Festum Natalis Domini Anno Dñi MDCLXXXVIII. ante præd' tempus quo &c. necnon eodem tempore quo &c. eidem Johanni Cory modo Advocan' aretro fuer' & non solut' idem Johannes Cory in Jure suo proprio bene advocat' Et præd' Johannes Cocke & Willielmus ut Balfij præd' Johannis Cory modo Advocan' bene cogn' capconem averiorum prædictorum in præd' loco in quo &c.

And demised
for 99 years,
if A.B. &c. or
either of them
should so long
live.

Reddendum.

Entry into the
Premises.

The Father
being seised of
the Reversion,
died seised.

Descend to the
Avowant, as
Heir at Law.

Who is seised
of the Rever-
sion.

And for Rent
arrear dis-
trained.

In the Lands
subject to the
Districks.

An Averment
of the Lessees
Life.

Bar to the
Avowry.

Confesses the
Seisin of the
Father of one
Third.

And that J.S.
was seised of
the other two
parts.

And that J.S.
Licenced the
Defendant to
put in their
Cattel.

Which they
did.

ut in & super præd' terciam partem tenementorum prædictorum eidem Jacobo Robyns ut præfertur dimiss. p eisdem tribus libris sex solid' & octo denar' de reddit' præd' in forma præd' aretro existen' Et iuste &c. Cum hoc quod iidem Johannes Cory Johannes Cocke & Willielmus verificare volunt quod præd' Johannes Robyns adhuc superstes & in plena vita existit videlicet apud paroch' de Blisland præd' &c.

Et præd' Willielmus Kempe Edwardus Laundry & Edwardus Cheapman dicunt quod nec præd' Johannes Cory modo advocan' ratione præallegat' capconem averiorum prædictorum iustam advocare neque præd. Johannes Cocke & Willielmus Cocke eadem ratione ut Balfij ipsius Johannis Cory capconem averiorum præd' in prædicto loco in quo &c. iustam cognoscere debent quia dicunt quod bene & verum est quod præd' Johannes Cory pater præd' Johannis Cory modo Advocan' seisit' fuit in dominico suo ut de feodo de & in tercia parte prædicti mesuagij & tenementi (vocat' Trewint) p'ut iidem Johannes Cory modo Advocan' Johannes Cocke & Willielmus Cocke superius allegaver' set iidem Willielmus Kempe Edwardus Laundry & Edwardus Cheapman dicunt quod ante præd' tempus quo &c. quidam Willielmus Spry gen' seisit' fuit in dominico suo ut de feod' de & in duabus aliis terciis partibus prædicti mesuagij sive tenementi (vocat' Trewint) unde præd' viginti acr' terræ in quibus &c. sunt & præd' tempore quo &c. necnon à tempore cuius contrarij memoria hominum non existit fuer' parcell' prædictoque Willielmo Spry sic inde seisit' existen' ipse idem Willielmus Spry ante præd' tempus quo &c. scilicet primo die Marcij anno regni domini Regis & dominæ Reginæ nunc primo supradicto apud Blisland præd' dedit licentiam eisdem Willielmo Kempe Edwardo Laundry & Edwardo Cheapman ad ponend' averia prædicta in prædicto loco in quo &c. ad herbam ibidem crescen' depascen' Virtute cuius licentiæ iidem VVillielmus Kempe Edwardus Laundry & Edwardus Cheapman ante præd' tempus capconis averiorum prædictorum &c. posuer' averia sua præd' in præd' locum in quo &c. ac averia illa fuer' in præd' loco in quo &c. quousque præd' Johannes Cory modo Advocan' Johannes Cocke & VVillielmus Cocke decimo nono die Junij anno regni domini Regis & dominæ Reginæ nunc primo apud Blisland præd' ceperunt eadem averia ipsorum VVillielmi Kempe Edwardi Laundry & Edwardi Cheapman videlicet in prædicto loco (vocat' fludder Park al' Bladder Park) & ea injuste detinuer' contra vad' & pleg' quousque &c. prout præd' VVillielmus Kempe Edwardus Laundry & Edwardus Cheapman superius versus eos quer' Et hoc parat' sunt verificare unde ex quo præd' Johannes Cory Johannes Cocke & VVillielmus Cocke capconem averiorum præd' cogn' iidem VVillielmus Kempe Edwardus Laundry & Edwardus Cheapman petunt iudicium & dampna sua occasione capconis &

& injuste detenconis Averiorum prædictorum sibi adjudicari
&c.

Et prædicti Johannes Cory Johannes Cocke & VVillielmus Cocke dicunt quod prædictum placitum prædictorum VVillielmi Kempe Edwardi & Edwardi superius ad advocare ipsius Johannis Cory & ad cogniconem ipsorum Johannis Cocke & Willelmi Cocke modo & forma prædicti superius in barram placitat' minus sufficien' in lege existunt ad ipsum Johannem Cory ab advocare ac ad prædicti Johannem Cocke & Willelmum Cocke à cognicone suis prædicti versus præfat' VVillielmum Kempe Edwardum & Edwardum habend' præcludend' quodque ipsi ad placitum illud modo & forma prædicti placitat' necesse non habent nec per legem terræ tenentur respondere Et hoc parat' sunt verificare unde pro defectu sufficien' placiti in barram ad advocare & cogn' prædicti in hac parte iidem Johannes Cory Johannes Cocke & Willelmus Cocke pet' Judicium & retorn' averiorum prædictorum unacum dampnis &c. sibi adjudicari &c.

Demurrer to
the Bar.

Et prædicti Willelmus Kempe Edwardus Laundry & Edwardus Cheapman ex quo ipsi sufficien' materiam in lege ad præd' Johannem Cory ab advocare suo prædicti & ad prædicti Johannem Cocke & VVillielmum Cocke à juste cognoscend' capconem averiorum prædictorum in prædicto loco in quo &c. præcludend' superius allegaver' quam ipsi parat' sunt verificare Quam quidem materiam prædicti Johannes Cory Johannes Cocke & VVillielmus Cocke non dedic' nec ad eam aliquatit' respond' set verificalionem ill' admittere omnino recusant per' Judicium & dampna sua ocone capconis & injuste detenconis averiorum prædictorum sibi adjudicari &c. Et quia Justic' hic se advisare volunt de & super præmissis prædicti priusquam Judicium inde reddant dies dat' est partibus prædicti hic usque à die Sancti Michaelis in tres Septimanas de audiend' inde Judicio suo eo quod iidem Justic' hic inde nondum &c.

Joynder in
Demurrar.

Kempe versus Cory & al.

In a Replevin the Plaintiff declared for the taking of his Cattle the 19th of June 1 VVillielmi & Mariæ at D. in a place called Fludder Park.

The Defendant avows; for that the locus in quo containeth twenty Acres, and saith that he was seised of a Third part of a Messuage and Tenement called Trewint, of which the said twenty Acres are, and for time whereof, &c. were parcel; and that he being so seised long before the taking, demised the said Third part of the said Messuage and Tenement to one James Robyns, to have and to hold for 99 years at the yearly Rent of 1 l. 13 s. and 4 d. payable Quarterly during the said Demise. And that

G g 2

the

the said Robyns entred, and for two years Rent arrear at the Feast of the Nativity, in the Year of our Lord 1688. he distrained the Cattle in the Declaration.

The Plaintiff Replied in Bar of the Avowry, and Confessed the Seisin of a Third part of the said Messuage and Tenement, and the Lease prout &c. but saith, that before the taking one William Spry was seised in his Demesne, as of Fee, of the other two parts of the said Messuage and Tenement called Trewint, of which the said twenty Acres are parcel. And he being so seised, the said William Spry, before the time of the taking, did give License to the Plaintiff to put his Cattle into the said twenty Acres, and he put them in by the said License; where they continued till the Plaintiff took them, and detained them prout, &c.

To this the Avowant Demurred.

It was held clear by the Court, That the Third part and two parts, being undivided, the Avowant could not Distrain the Cattle of him that had the Two parts, or the Cattle of any one which were put in by his License upon any part of the Land.

But Pollexfen Chief Justice doubted, in regard the Avowry was of the taking in prædicto loco in quo ut in & super prædict' tertiam partem tenementi prædict', Whether the Plaintiff should not have traversed absque hoc, that the taking was in tertia parte tantum, and shewn in the Inducement to such traverse how they held in Common? Vide More and Newman's Case in Hobart 80, 103. Et Adjornatur.

Tovey versus Pitcher.

Covenant
against an
Assignee of an
Executrix.

The Plaintiff
possessed of a
Term for years
yet in being.

Midd'x ss. **T**HOMAS PITCHER nuper de VVestm' in Com' prædict' gen' Assign' Susannæ Gill Executric' Testamenti & ult' volunt' Richardi Gill nuper dict' Richardi Gill of the Parish of St. Martins in the fields aforesaid Wintner, sum' fuit ad respond' Christianæ Tovey de placito quod teneat ei convencon' inter prædict' Christian' & præfat' Ric' in vita sua factam secundum vim formam & effectum quarundam Indenturarum inde inter eos confect' &c. Et unde eadem Christiana per Carolum Draper Attorn' suum dicit quod cum ipsa prædict' Christiana decimo quinto die Julij Anno Domini Millesimo sexcentesimo octogesimo & extunc hucusque fuit & adhuc existit possessionat' de duobus messuag' sive tenement' cum pertin' in paroch' Sancti Martini in Campis in Com' Midd' prædict' pro major' Termino tunc & adhuc ventur' Et sic inde possessionat' existen' præd' Christiana postea scilicet eodem decimo quinto die Julij Anno Millesimo sexcentesimo octogesimo

octogesimo supradict' apud prædict' paroch' Sancti Martini in Campis in Com' Midd' præd' per quandam Indentur' factam inter eandem Christian' per nomen Christianæ Tovey de paroch' sancti Martini in Campis in Com' Midd' Vid' ex una parte Et prædict' Richardum Gill per nomen Richardi Gill de paroch' sancti Martinis in Campis prædict' Wintnet ex altera parte cujus alteram partem sigillo præd' Richardi signat' eadem Christiana hic in Cur' profert cujus dat' est eisdem die & anno pro & in consideracon' annual' reddit' & convencon' postea in Indentur' præd' reservat' menconat' & content' ex tenen' vel less. parte & vice solvend' faciend' & performand' dimisisset concessisset & ad firmam tradidisset præfat' Richardo Executor' Administrator' & Assign' suis totum ill' frontal' mesuag' sive tenement' cum pertin' sicut idem tunc fuit in occupacon' præd' Richardi vocat' sive cognit' per nomen vel signum de le flecte scituat' jacen' & existen' in Venella sancti Martini (Anglicè *St. Martins Lane*) in paroch' sancti Martini in Campis prædict' cum Romæis scituat' supra viam Januæ (Anglicè *Gate-way*) ducent' in Aream (Anglicè vocat' *Moors Yard*) quod quidem mesuag' sive tenement' abutasset occidental' super Venellam sancti Martini præd' oriental' super retrorsum mesuag' (Anglicè a back *Messuage*) sive tenement' extunc imposteriorum dimissum boreal' super mesuag' sive tenement' tunc in occupacon' Radulphi Mayor *Coach-maker* & austral' super mesuag' sive tenement' tunc in occupacon' Dowdall Campbell Scissor' Ac etiam totum ill' retrorsum mesuag' (Anglicè a back *Messuage*) sive tenement' cum pertin' tunc etiam occupacon' præd' Richardi scituat' jacen' & existen' in oriental' partem (Anglicè *the East-side*) dicti Frontal' mesuag' sive tenement' & Frontal' aream prædict' (Anglicè vocat' *Moors Yard*) simul cum omnibus viis passag' luminibus esiamet' aquarum proficuis commoditat' & pertin' quibuscunque dictis mesuag' sive tenementis seu eorum alteri spectan' aut aliquo modo pertinen' Habend' & occupand' dicta Frontal' mesuag' sive tenement' & præmissa cum pertin' adinde spectan' præfat' Richardo Executor' Administrator' & Assign' suis à Festo Annunciacon' Beatæ Mariæ Virgin' tunc ult' præterit' ante dat' Indentur' poiet' usque plenum finem & termin' viginti & unius annorum extunc prox' sequen' & plenar' complend' & finiend' Ac etiam habend' & occupand' dicta retrorsum mesuag' sive tenement' & præmissa cum pertin' adinde spectan' præfat' Richardo Executor' Administrator' & Assign' suis ab & immediate post finem & expiracon' prior' dimission' (Anglicè *Lease*) ejusdem fact' Jacobo Supple quæ quidem dimissio determinaret & expiraret in vel ante Annum Domini nostri Dei (secundum computacon' in Angl' usitat') Millesimum sexcentissimum octogessimum primam usque plen' finem & terminum Novemdecim annorum & unius quarter' anni ex tunc prox' sequen' & plenar' complend' & finiend' Reddend' & solvend' proinde annuatim

By Indenture
demised to the
Testator.

Habendum.

The Term.

Habend' for a
further Term.

Reddendum.

annuatim & quolibet anno duran' tam longo tempore primi termini annorum quam dicta dimiss. (Anglicè Lease) prælat' Jacobo Supple facta continuaret eidem Christianæ Executor' Administrator' vel Assign' suis annual' reddit' vel summam trigint' & quinque librar' ad quatuor maximè usual' Festa seu terminos in Anno (videlicet) Nativitat' sancti Johannis Baptistæ sancti Michaelis Arch'i Natalem Domini nostri Dei & Annunciacon' Beatæ Mariæ Virginis per æquas & æquales porcon' Ac etiam reddend' & solvend' pinde annuatim & quolibet anno durante ultimo termino post finem & expiracon' dimission' (Anglicè Lease) concess. præfat' Jacobo Supple eidem Christianæ Executor' Administrator' vel Assign' suis annual' reddit' sive summam quadragint' librar' legalis monet. Angl' ad quatuor maxime usual' Festa sive terminos in anno (videlicet) Natal' Domini nostri Dei Annunciacon' Beatæ Mariæ Virgin' Nativitat' sancti Johannis Baptistæ & sancti Michaelis Arch'i per æquas & æqual' porcon' prima solucon' inde incipiend' & faciend' in tali dict' Fest' qual' primo & p' accideret post finem & determinacon' dictæ dimission' præfat' Jacobo Supple factæ Proviso semper quod si accideret dict' annual' reddit' trigint' & quinque librar' & quadragint' librar' aut eorum alterut' seu aliqui inde parcell' vel eorum alterutrius fore aretro & insolut' per spacium quatuordecim dierum p' super vel post aliquos Festival' dies p'dict' quibus eadem solviss. debuer' (existen' legitime demandat) qd' tunc & extunc esset & possit licitum fore ad & pro eadem Christiana Executor' Administrator' & Assign' suis in dicta dimiss. præmiss. cum pertin' & in quamlibet vel aliquarum partem eorundem in nomine totius totalit' reintrare & eadem rehabere retiner' & gaudere ut in ejus seu eorum primo & priori statu seu statubus (prædict' Indentur' aut aliqua re in eadem content' in contrar' inde in aliquo non obstan') Et prædict' Richardus pro seipso Executor' Administrator' & Assign' suis & pro quibuslibet eorum convenisset promississet & concessisset ad & cum eadem Christiana Executor' Administrator' & Assign' suis & eorum quibuslibet p' Indentur' præd' modo & forma sequen' (videlicet) Quod ipse prædict' Richardus Executor' Administrator' & Assign' sui de tempore in tempus & ad omnia tempora extunc imposterum duran' dict' sepeal' terminis per Indentur' prædict' concess. bene & fidelit' solverent vel solvi causarent dicta sepeal' reddit' annual' eidem Christianæ Executor' Administrator' & Assign' suis supra dictos sepeal' Festival' dies & terminos in anno in quibus iidem solvi debuissent secundum veram intencon' & ppositum Indentur' præd' & sepeal' reservacon' inde prout in eadem Indentura præantea menconat' & specificat fuit Et per Indorsament' super Indentur' præd' agreeat' fuit per & inter partes præd' ad & ante sigillacon' & deliberacon' ejusdem Indentur' Et præd' Richardus p seipso Executor' Administrator' & Assign' suis convenisset promississet & concessisset ad & cum eadem Christiana Executor'

Proviso.

Clause of Re-entry.

Covenants.

To pay the Rent.

Executor Administrator & Assign suis quod ipse prædictus Richardus Executor Administrator & Assign sui vel eorum aliquis super primū diem Januarii in quolibet anno annuatim duran' Termino viginti & unius annorum in Indentur' prædict' concess. solverent & deliberarent vel solvi & deliberari causarent eidem Christian' Executor Administrator vel Assign suis apud vel in tunc domum menconal' ejusdem Christianæ scituat' in paroch' sancti Martini in Campis in Indentur' prædict' infra script' duodecim plen' quart' utres (Anglicè **Bottles**) boni & merchandizabil' Vini Hispanici (Anglicè vocat' **Canary**) prout per eandem Indentur' & Indorsament' inde inter al' plenius liquet & apparet Virtute cujus dimission' prædict' Richardus in vita sua in prædict' dimiss. præmiss. intravit & fuit inde possessionat' Et sic inde possessionat' existen' prædict' Richardus postea scilicet decimo septimo die Julij Anno Dñi Millesimo sexcentesimo octagesimo supradicto apud Paroch' & Com' prædict' condidit testament' & ult' voluntat' sua in script' & per eandem volunt' suam præd' Susannam Executric' ejusdem Testamenti sui constituit & ordinavit Et postea scilicet vicesimo primo die Octobr' eisdem anno & loco ult' supradict' ipse prædict' Richardus obiit de & in prædict' dimiss. præmiss. cum pertin' possessionat' post cujus mortem prædict' Susanna onus execucon' Testamenti prædict' super se suscepit Et ut Executrix Testamenti prædict' in præd. dimiss. præmiss. cum pertin' intravit & fuit inde possessionat' ratione execucon' Testamenti prædict' Ipsaque Susanna sic inde possessionat' existen' eadem Susanna postea scilicet quarto die Junij Anno Domini Millesimo sexcentesimo octagesimo quinto apud paroch' & Com' prædict' concessit totum Stat' jus titulum interesse & termin' annorum suum quæ ipsa tunc habuit ventur' de & in prædict' præmiss. cum pertin' præfat' Thomæ Virtute cujus concession' Idem Thomas postea scilicet eisdem die anno & loco ult' supradict' in prædict' præmiss. cum pertin' intravit & fuit & adhuc existit inde possessionat' Et eadem Christiana protestando quod ipsa eadem Christiana à tempore confecon' Indentur' præd' hucusque bene & fidelit' observavit performavit & perimplevit omnes & singulas convencon' promission' & concession' in Indentur' prædict' superius specificat' ex parte sua observand' performand' & perimplend' secundum formam & effectum Indentur' prædict' protestandoque etiam qd' prædict' Thomas post concession' prædict' ei ut præfertur fact' hucusque non observavit performavit seu perimplevit aliquas convencon' promission' seu concession' in Indentur' præd' superius specificat' ex parte sua observand' performand' & perimplend' secundum formam & effectum Indentur' ill' in facto eadem Christiana dicit quod post concession' prædict' eidem Thomæ ut præfertur factam scilicet ad primum diem Januarii anno regni domini Regis & dominæ Reginæ nunc primo vigint' & quatuor quartæ utr' Vini Hispanici (Anglicè quart' **Bottles** of **Canary Wine**) per

Entry and Possession.

The Lessee made his Will.

And made the Assignor his Executrix, and died.

She proved the Will and entered.

And assigned to the Defendant.

Who entered, and still is possessed.

Breach assigned in the Non-payment of the Rent.

per Indorsament' super Indentur' prædict' reservat' pro duobus annis finit' ad prædict' primum diem Januar' anno primo supradicto eidem Christian' aretro fuer' insolut' & non deliberat'. Et quod ad Festum Annunciacon' Beatæ Mariæ Virgin' anno regni dicti domini Regis & dominæ Reginæ nunc secundo sexagint' libr' de annual' reddit' quadragint' librar' prædict' pro uno anno integro & dimid' unius anni finit' ad prædict' Festum Annunciacon' Beatæ Mariæ Virgin' anno secundo supradicto eidem Christianæ similiter aretro fuer' & insolut' quodque prædict' Thomas non solvit nec deliberavit prædict' viginti & quatuor quart' utr' Vini Hispanici (Anglicè Canary Wine) super prædict' primum diem Januar' anno primo supradicto nec prædict' sexagint' libras seu aliquam inde denar' ad prædict' Festum Annunciacon' Beatæ Mariæ Virgin' anno secundo supradict' quas ei ad eundem diem & Festum solvisse debuit secundum formam & effect' Indentur' prædict'. Et sic eadem Christiana dicit quod prædict' Thomas licet sæpius requisit' convencon' suam prædict' cum eadem Christian' in hac parte factam non tenuit set infregit ac ali' ei tenere hucusque contradixit & aduc' contradicit Unde dic' quod deteriorat' est Et dampnum habet ad valenc' septuagint' libr' Et inde producit' sectam &c.

The Defendant
pleads, That he
assigned over
before any
Rent due.

Et prædict' Thomas per Willielmum Pocklington Attorn' suum ven' & defend' vim & injur' quando &c. Et quoad fraccon' convencon' prædict' in non solucon' duodecim quart' utr' Vini Hispanici parcell' prædict' viginti & quatuor utr' in Narr' prædict' superius spec' pro uno anno finit' ad primum diem Januar' Anno Domini Millesimo sexcentesimo octogesimo octavo & vigint' libr' de prædict' sexagint' libr' parcell' quæ devener' aretro & insolut' pro dimid' unius anni finit' ad Festum Annunciacon' Beatæ Mariæ Virgin' anno regni dictorum domini Regis & dominæ Reginæ nunc primo supradicto Idem Thomas dic' quod ipse non potest dedicere accon' prædict' Christianæ inde prædict' nec quod ipse convencon' prædict' in ea parte quod ill' duodecim quart' utr' Vini Hispanici ac prædict' vigint' libr' infregit in forma qua eadem Christian' per Narracon' suam præd' superius suppon'. Et quoad fraccon' convencon' præd' in non solucon' duodecim quart' utr' Vini Hispanici resid' præd' vigint' & quatuor quart' utr' Vini Hispanici necnon in non solvend' quadragint' libr' de præd' sexagint' libr' resid' in Narr' præd' spec' idem Thomas dic' quod præd. Christian' accon' suam præd' inde versus eum habere non debet quia dic' quod ante iidem duodecim quart' utr' Vini Hispanici aut aliqua parcell' inde aut eadem quadragint' libr' pro reddit' Tenementorum præd' cum pertinet vel aliqua inde parcell' deven' debet' aretro seu solubil' scilicet decimo quarto die Junij anno regni domini Regis & dominæ Reginæ nunc primo supradicto apud parochiam præd' in Com' præd' ipse idem Thomas concessisset & assignavit cuidam Jacobo Mott de London' gen' totum statum titulum

titulum interesse & termin' annorum quæ idem Thomas adtunc habuit ventur' de & in Tenementis præd' cum pertin' Virtute cuius quidem assignacon' Idem Jacobus Mort postea scilicet eisdem die & anno in Tenementa præd' cum pertin' intravit & fuit & adhuc est inde possessionat' pro resid' prædict' Termini superius in Narr' præd' spec' & hoc parat' est verificare Unde pet' Judicium si prædict' Christiana accon' suam prædict' inde versus cum habere debeat &c.

Et prædict' Christiana dicit qd' placitum præd' Thomæ quoad fraccon' convencon' prædict' in non solucon' prædict' duodecim quart' utr' Vini Hispanici resid' prædict' vigint' & quatuor quart' utr' Vini Hispanici necnon in non solvend' prædict' quadragint' libr' de prædict' sexagint' libr' resid' in Narracon' prædict' specificat' superius in barram placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipsam Christian' ab accon' sua præd' versus præfat' Thomam habend' præcludend' quodque ipsa ad placit' illud modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' respons. in hac parte eadem Christian' pet' Judicium & dampn' sua ocon' fraccon' convencon' prædict' sibi adjudicari &c.

Demurrer to part.

Et præd' Thomas ex quo ipse sufficien' materiam in lege ad præd' Christianam ab accon' sua præd' versus præfat' Thomam quoad fraccon' convencon' præd' in non solucon' præd' duodecim quart' utr' Vini Hispanici resid' præd' viginti & quatuor quart' utr' Vini Hispanici necnon in non solvend' præd' quadragint' libr' de præd' sexagint' libr' resid' in Narracon' præd' specificat' habend' præcludend' superius placitando allegavit quam ipse idem Thomas parat' est verificare Quam quidem materiam præd' Christiana non dedic' nec ad eam aliqualit' respond' sed verificacon' illam admittere omnino recusat idem Thomas pet' Judic. Et quod præd' Christiana ab accon' sua præd' inde versus ipsum Thomam habend' præcludetur &c.

Joynder la Demurrer.

Ac p' eo quod eadem Christiana dampna sua ocone fracconis convenconis præd' in non solucon' prædictorum duodecim quart' utr' Vini Hispanici in placito ipsius Thomæ primo superius menconat' ac prædict' viginti libr' per ipsum Thomam in forma præd' superius cogn' Et quia conveniens est quod unica fiat taxaco' dampnorum p' totis præmissis in uno brevi specificat' si contingat' Judicium pro eadem Christiana versus præfat' Thomam quoad fracconem convenconis præd' in non solucon' prædictorum duodecim quart' utr' Vini Hispanici prædictorum viginti & quatuor quart' utr' Vini Hispanici resid' ac prædictorum quadraginta librar' de præd' sexaginta libris resid' unde partes præd' in Judic' Cur' hic superius se poluer' reddi

Judgment for the other part

Un' taxatio dampnorum.

Ideo cesset emanac' brevis de Inquirendo de dampnis ocone fracconis convenconis præd' in non solucone prædictorum duodecim quart' H h

Cesset brevis de Inquirend' de dampnis quousque.

quart' utr' Vini Hispanici in placito ipsius Thomæ primo superius menconat' ac prædictorum viginti librarum in eodem placito p ipsum Thomam in forma prædicta superius cogn' quousque materia in lege præd' unde partes præd' superius in Judicium Cur' hic se posuer' terminetur &c. Et quia Justic' hic à advisare volunt' de & super præmissis Unde partes prædict' in Judicium Cur' hic superius se posuer' priusquam Judicium inde reddant dies inde dat' est partibus prædictis hic usque—de audiendo inde Judicio suo eo quod iidem Justic' hic inde nondum &c.

Tovey versus Pitcher.

In an Action of Covenant against the Defendant, as Assignee of Susan Gill, Executrix of Elizabeth Gill, the Plaintiff Declared of a Demise of a Messuage to Richard Gill, reserving Rent; and that Gill entered and died possessed, and that after the said Susan (his Executrix) entered, and the 4th of June 1685. assigned the Lease to the Defendant; and shewed, that the Defendant had not paid Half a years Rent due on the 1st of January 1689.

The Defendant pleads, That before the said Rent became due, (viz.) the 4th of June 1689. he granted and assigned all his Estate and Interest in the Premises to one James Mott of London Gent. who entered by virtue of the said Assignment. and is yet possessed, &c.

And to that the Plaintiff Demurred.

The sole Question was. Whether the Defendant ought to have given Notice to the Plaintiff of the Assignment. Et Adjornatur.

Lawson versus Haddock.

Debt upon a
Sheriff's Bond.

Cumby' ff. TIMOTHEUS HADDOCK nuper de Civit' Carlisle in Com' Cumbr' Mercer alias dict' Timotheum Haddock de Civitat' Carlisl' in Comitatu Cumbr' Mercer Sum' fuit ad respondend' Wilfrido Lawson Bar' Vic' Com' prædicti de placito quod reddat ei quadraginta libras quas ei debet & injuste detinet &c. Et unde idem Wilfridus per Thomam Brooke Attorn' suum dicit quod cum prædictus Timotheus vicesimo primo die Aprilis anno regni Regis & Reginae Willielmi & Mariae secundo apud Carlisle prædict' per quoddam scriptum suum Obligatorium concessisset se teneri eidem Wilfrido per nomen Wilfridi Lawson Bar' Vic' Com' prædicti in prædictis quadraginta libris solvend' eidem Wilfrido cum inde postea requisit' esset prædict' tamen Timotheus licet

licet sæpius requisit' prædictas quadraginta libras eidem Wilfrido nondum reddidit set ill' ei reddere omnino contradixit & adhuc contradic' unde dic' quod deteriorat' est Et dampn' habet ad valenciam triginta librarum Et inde produc' sectam &c. Et profert hic in Cur' scriptum prædict' quod debitum prædict' in forma prædict' testatur cujus dat' est eisdem die & anno supradictis &c.

Et prædictus Timotheus per Johannem Pattison Attorn' suum ven' & defendit vim & injuriam quando &c. Et pet' auditum scripti prædict. Et ei legitur &c. petit etiam auditum Condicionis ejusdem scripti Et ei legitur in hæc verba ff. Condico istius Obligaconis talis est quod si super Obligar' Timotheus Haddock compareat coram dict' domino Rege & Regina in Cancellar' apud Westm' in Quinden' Pasche prox' futur' ad respondend' dict' domino Rege & Regina tam de quodam Contemptu per præfat' Timoth' dict' domino Regi & Regina illat' quam de his quæ sibi tunc & ibidem objicientur Et ad faciend' ulterius & recipiend' quod dict' Cur' Cons in hac parte quod tunc hæc præsens Obligar' vacua foret & nullius vigoris aliter stet & permaneat in suo pleno robore vigore & effectu Quibus lectis & auditis idem Timoth' dic' quod prædict' Wilfridus acconem suam prædict' versus eum habere non debet Quia dic' quod pet' quendam Actum factum in Parlamento domini Henrici nuper Regis Angl' &c. sexti tent' apud Westm' in Com' Midd' vicefimo quinto die Februarij anno regni sui vicefimo tertio recitan' in eodem Actu quod dictus Rex consideran' magnam perjuriam extorcon' & oppress. que tunc præantea fuerunt in Regno Angl' per suos Vic' Subvic' & eorum Clericos Coronatores Seneſchall' Franchef. Ballivos & Custod' Prison' & al' Officiar' in diversis Com' istius regni inter alia inactitat' fuit Authoritate ejusdem Parlamenti in evitacōn' omn' tal' extorcon' perjuriar' & oppression' quod nullus Vic' ad firmiam traderet in aliquo modo Com' suum nec aliqua Ballivarum suarum Hundred' nec Wapentack Et quod prædict' Vic' & omnes al' Officiar' & Ministri prædicti traderent extra Prisonam omnimod' person' per ipsos aut aliquem eorum arrestat vel existen' in eorum Custod' virtute alicujus brevis Billæ sive Warranti in aliqua accone personal' aut per causam Indictament' de Transgr' super rationabili fidejuss. sufficien' personarum habend' sufficien' infra Com' ubi tal' Prisona sic forent tradit' ad balliv' sive manucapconem ad Custod' eorum dies in talibus locis qual' prædict. Brevia Billæ sive Warrant' requirerent (tal' person' sive personis quæ fuer' sive forent in eorum Custod' per Condempnacōn. Execucon' Capias Utlagar' vel Execōicacon' securitat' de Pace & omnibus talibus personis quæ fuer' sive forent commiss. ad Custodiam per spec' Mandat' alicujus Justic' & vagabund' recusant' servire secundum formam Statut' de laboratoribus tantummodo except') Et quod null' Vic' nec aliquis Officiar' vel Ministror' prædict' capereut vel capi causarent seu facerent aliquam Obligaconem pro aliquat

Defendant
prays Oyer of
the Condition.

The Condition.

The Statute of
Hen. the 6th
pleaded.

2716.

Attachment
issued out of
Chancery.And delivered
to the Sheriff.The Defen-
dant arrested.

aliqua Causa supradicta vel colore eorum Officij sed solummodo sibi metipsis de aliqua persona nec per aliquam personam quæ esset in eorum Custod' per cursum legis Nisi per nomen eorum Officii & super Condicion' script' quod prædict'. Prisonar' compareret ad diem content' in dictis Brev' sive Warrant' ac in talibus locis qual' prædict' Brevia Billæ sive Warrant' requirerent Et si aliquis prædict' vel Vic' vel al' Officiar' aut Ministr' prædict' facerent seu caperent aliquam Obligationem in aliqua alia forma colore Officiorum suorum quod vacua foret prout in eodem Actu (inter alia) plenius liquet & apparet Et idem Timoth' ulterius dic' quod post editionem Actus prædicti Ac prædicto tempore consecconis scripti prædicti scilicet prædicto vicesimo primo die Aprilis anno secundo supradicto & diu antea prædictus Wilfridus Lawson fuit Vic' prædict' Com' Cumb' ad officium illud debit' elect' & præfect' quodque ante conseccon' scripti Obligatorij prædict' scilicet decimo octavo die Febr' anno regni Regis & Reginae nunc secundo supradicto quoddam breve eorundem Regis & Reginae de Attachiamiento de Contemptu è Cur' Cancellar' ipsorum Regis & Reginae apud Westm' in Com' Midd' tunc existen' Vic' prædict' Com' Cumb' direct' emanavit versus eundem Timoth' per quod quidem breve Præcept' fuit eidem Vic. quod Attach'eundem Timoth'. Ita quod haberet eum coram eisdem domino Rege & domina Regina in Cancellar' sua prædict' in Quindenam Pasche tunc prox' sequen' ubicunque Cur' ill' tunc tent' foret in Angl' ad respondend' dictis domino Regi & domina Reginae tam de quodam Contemptu per præfat' Timoth' eisdem Regi & Reginae illat' quam de hiis quæ sibi tunc & ibidem objicerentur Et ad faciend' ulterius & recipiend' quod dicti Cur' consideraret in ea parte Quod quidem breve postea & ante retorn' ejusdem scilicet primo die Aprilis anno regni Regis & Reginae nunc secundo supradicto apud Carlisle prædict' in Com' prædicto deliberat' fuit eidem Wilfrido Lawson ad tunc Vic' ejus Com' in forma juris exequend' Virtute cujus quidem brevis idem Vic' postea & ante conseccon' scripti prædict' scilicet eodem vicesimo primo die Aprilis anno secundo supradicto apud Carlisle prædict' eundem Timoth' per corpus suum Attachiavit ac ipm in Custod' sua ibidem habuit & detinuit quousque ipse idem Timoth' ac quidam Richardus Letchat de Civitat' Carliol' in eodem Com' gen' postea scilicet eodem vicesimo primo die Aprilis anno secundo supradicto apud Carlisle prædict' per script' Obligatorium prædict' sigillis suis signat' & eidem Wilfrido ut factum suum deliberat' conjunctim & divisim devener' tent' & obligat' eidem Wilfrido in prædict' quadragint' libris sub Condicione prædict' p' easiamento & favore eidem Timoth' de imprisonment' suo prædict' per prædict' Wilfridum demonstrand' & p' deliberacone sua ab imprisonment' illo habend' & obtinend'. Quod quidem scripte Obligatorium idem Wilfridus colore Officii sui prædicti de eodem Timoth' & præfat' Richardo

Richardus contra formam Statuti prædicti cepit Et sic idem Richardus dicit quod scriptum Obligatorium illud in forma prædicta & ex causa prædicta facti vigore Statuti prædicti vacuum in lege existit Et hoc idem Richardus parat' est verificare Unde per' Judicium si prædictus Wilfridus acconem suam prædictam versus eum habere debeat &c.

Et prædictus Wilfridus dic' quod placitum præd' prædict' Timoth' superius placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipsum Wilfridum ab accone sua præd' versus p'fat' Timotheum habend' præcludend' quodque ipse ad placitum illud modo & forma præd' placitar' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde pro defectu sufficien' placiti in hac parte Idem Wilfridus per' Judicium & debitum suum prædict' una cum dampnis suis occone detenconis debiti illius sibi adjudicari &c.

Demurrer to the Plea.

Et præd' Timotheus ex quo ipse sufficien' materiam in lege ad prædict' Wilfridum ab accone sua præd' versus ipsum Timotheum habend' præcludend' superius allegavit quam ipse parat' est verificare Quam quidem materiam prædict' Timotheus non dedic' nec ad eam aliqualit' respondet set verificacionem ill' admittere omnino recusat ut prius per' Judicium Et quod prædict' Wilfridus ab accone sua prædict' versus ipsum Timotheum habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super præmissis prædictis priusquam Judic' inde reddant dies dat' est partibus prædict' hic usque à die Sancti Michaelis in tres Septimanas de audiendo inde Judicio suo eo quod iidem Justic' hic nondum &c.

The Plaintiff joyns in Demurrer.

Lawson versus Haddock.

In an Action of Debt upon a Sheriffs Bond, the Condition was; That the Defendant should appear coram Rege & Regina in Cancellaria apud Westm. in Quinden' Paschæ, which was the Return Day of an Attachment issued out of Chancery against him for a Contempt.

The Defendant pleaded the Statute of 23 H. 6. which (inter alia) Enacts, That the Sheriffs, &c. should let to Bail such persons as were Arrested and in their Custody, by virtue of any Writ, Bill or Warrant, in any Action Personal, or upon any Indictment of Trespass. And upon Condition, that they should appear at the Day and Place in the Writ, &c. mentioned; and that all Bonds taken in other form should be void.

And the Defendant further said, That by an Attachment awarded out of Chancery against him, the Plaintiff being then Sheriff, was commanded to have the Defendant coram Rege & Regina in Cancellaria in Quinden' Pasch' ubicunque Cur' illa tunc foret in Anglia; and

and the Plaintiff took him by virtue of the said Writ, and detained him till he had given the said Bond with Condition, as aforesaid, pro easiamento & favore, &c. Which said Bond the Plaintiff colore Officij took of the Defendant contra formam Statuti &c. & sic dicit quod scriptum Oblig' vigore Statuti prædict' vacuum in lege existit & hoc parat' est verificare, &c.

To this the Plaintiff Demurred:

First, The Statute saith, That where the party is in Custody by virtue of any Writ, &c. in any Action, or upon any Indictment of Trespas: And an Attachment for Contempt out of Chancery, is not within the words of the Statute, in the 3 Cro. Johns and Stratford 309. Taken by a Serjeant at Mace upon Process out of the Grand Sessions, held not within the Statute, in the 3 Leon. 280.

Secondly, The Condition is to appear coram Rege in Cancellar' apud Westm. instead of ubicunque, as the Writ is: for this vide Styl. 234. Burton aud Law, and Mo. 430. Corbett and Downing.

As to the first the Court inclined, That Attachments out of Chancery were within the Statute. 'Tis the constant Practice for Sheriffs to take Bail in such Cases. Vid. Styl. 234. Rolls's Opinion according.

As to the second Point 'tis true, That such Bonds have been judged void; but of later times the Court have not been so strict upon the Wording of such Bonds. And a Case was Cited to have been in B. R. Trin. 22 Car. 2. Rot. 914. where the Condition of a Sheriffs Bond was to appear coram Justiciariis nostris de Banco, and not said apud Westm. and yet held good.

But the Court gave leave to speak further to the Case at Bar.

Williams *versus* Bond.

A Prohibition to a Suit in the Ecclesiastical Court by the Defendant, Churchwarden of the Parish Church of St. Peter in Hereford, against the Plaintiff, charging him with the Repairs of the Chancel of the said Church, as Owner of the Priory-House, to which Owners it hath belonged (as was pretended) that out of mind to Repair the said Chancel; whereas there never was any such Custom as the Plaintiff suggested and set forth in his Declaration upon the Prohibition: And that he had so alleadged and pleaded in the Ecclesiastical Court, to hinder the Proceedings upon and trying such Custom in the Court Ecclesiastical; which the Judge there refused to admit, but doth proceed to Try, Determine and give Sentence against the Plaintiff upon the said

said pretended Prescription, whereas all such Custom ought to be tried at Law, &c.

The Defendant after a Traverse to any Proceedings after the Prohibition delivered pro Consultatione habenda, saith, That all the Proprietors of the said Messuage called the Priory-House, have Repaired the said Chancel time out of mind, & hoc parat est verificare, &c. unde petit Judicium & breve de Consultatione.

And to this the Plaintiff Demurred.

And the Court were of Opinion, that a Consultation should be granted; for they may sue upon this Prescription and try it there, as a Suit may be in the Ecclesiastical Court for a Modus decimandi; and tho' the Parson is of Common Right to Repair the Chancel, yet it may be upon a particular man's Estate by Prescription. Vide 1 Brownl. 16. 1 Roll. 126. Poph. 197. and Latch. 217.

Judith Hanson *versus* Liverledge.

Ebor' ff. SAMUEL LIVERLEDGE nuper de **Mitfield** Debt upon Bond.
 in Com' prædict' Deoniam alias dict' Samuelem Liverledge de **Mitfield** in Com' Ebor' Panificem Sum' fuit ad respondend' Judithæ Hanson Vid' de placito quod reddat ei Centum lib' quas ei debet & injuste detinet &c. Et unde eadem Juditha per Thomam Beaumont Attorn' suum dic' quod cum prædict' Samuel vicesimo quinto die Julij Anno Domini Millesimo sexcentesimo octogesimo nono apud **Mitfield** per quoddam scriptum suum Obligatorium concessiss' se teneri eidem Judithæ in prædict' Centum lib' solvend' eidem Judithæ cum inde requisit' fuiss'. Præd' tamen Samuel licet sæpius requisit' prædict' Centum lib' eidem Judithæ nondum reddidit set ill' ei hucusque reddere contradixit & adhuc contradic' Unde dic' quod deteriorat' est & dampn' habet ad valenc' decem lib' Et inde produc' sectam &c. Et profert hic in Cur' scriptum prædict' quod debitum prædict' in forma præd. testatur cujus dat' est die & anno supradictis &c.

Et prædict' Samuel per Johannem Empson Attornatum suum venit & defendit vim & injuriam quando &c. Et petit auditum Scripti præd' & ei legitur &c. per etiam auditum Condicionis ejusdem scripti Et ei legitur in hæc verba, **The Condition of this Obligation is such, That if the above-bounded Samuel Liverledge his Heirs, Executors and Administrators, for their parts and behalves, shall and do in all things well and truly stand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End and Determination of Edward Deane of Batley in the County of York, Clerk, and Robert Radcliffe of Adwalton in the said County, Gent. Arbitrators indif-**
 rently

The Defendant craves Oyer of the Condition.

The Condition is for the performance of an Award.

rently elected and named, as well on the part and behalf of the above-named Samuel Liversedge, as of the above-named Judith Hanson, to arbitrate, award, order, judge and determine, of and concerning all and all manner of Action and Actions, Cause and Causes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controversies, Trespases, Damages and Demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending, by or between the said parties, or either of them, so as the said Award be made and in Writing, or by Words of Mouth, and ready to be delivered to the parties in difference, (or such of them as shall desire the same) on or before Seven of the Clock in the Afternoon of this present Day, then this Obligation to be void, or else to remain in full force and virtue. Quibus lectis & auditis idem Samuel dixit quod praeiudicium Juditha accon suam praeiudicium versus eum habere non debet Quia dicit quod Arbitrator praeiudicium post consecutionem Scripti praeiudicium & ante praeiudicium Septimam horam post Meridiem praeiudicium vicesimi quinti diei Julij Anno Domini Millesimo sexcentesimo octogesimo nono supradicto nullum fecerit Arbitrium inter ipsam Samuel & praefatam Judith de & super praemissis in Condicione praeiudicium superius specificat. Et hoc parat est verificare Unde petit Iudicium si praeiudicium Juditha accon suam praeiudicium versus eum habere debeat &c.

The Defendant pleads, That the Arbitrators made no Award.

The Plaintiff sets forth an Award made *Ore tenus*.

The Plaintiff impleaded the Defendant in the Common Bench.

The Award made *Ore tenus*.

Et praeiudicium Juditha dicit quod ipsa per aliqua praeterlegat ab accone sua praeiudicium habendum praecludi non debet quia dicit quod ipsa eadem Juditha diu ante consecutionem scripti praeiudicium scilicet Termino Sanctae Trin anno regni domini Regis & dominae Reginae nunc primo in Curia ipsorum Regis & Reginae de Banco hic scilicet apud Westm in Com' Midd' implacitasset ipsum Samuel in quodam placito Transgre super Casum pro eo quod idem Samuel dixisset de praefata Juditha diversa scandalosa Anglicana verba Quod quidem placitum tempore consecutionis ejusdem scripti fuit penden & indeterminat quodque Arbitrator praeiudicium acceptus super se onere Arbitrii praeiudicium immediate post consecutionem scripti illius scilicet praeiudicium Vicesimo quinto die Julij Anno Domini Millesimo sexcentesimo octogesimo nono supradicto & ante Septimam horam post Meridiem ejusdem diei apud Wakefield praeiudicium Arbitrium suum ore tenus de & super praemissis in Condicione praeiudicium superius menconat fecerit & publicaverit ac partibus praeiudicium ibidem ante horam illam declaraverit modo & forma sequen videlicet quod si Samuel solveret eidem Judithae duodecim pecias Auri cuneat (vocat' Guinea's) ac omnes tal' denar' summ' qual' eadem Juditha erogasset seu expendisset in & circa prosecucion' plac' praeiudicium quodque immediate post hujusmodi solucon' alit' tam praeiudicium Juditha quam praeiudicium Samuel daret alteri eorum per scriptum general' relaxacon' omnium Accon' causar' Accon' demand' quorumcunque

cunque usque prædict' tempus confeccionis Scripti prædict' inter eos mouen'. Et eadem Juditha ulterius die' quod tempore confeccionis scripti Obligatorij præd' & Arbitrij prædicti quilibet pecia hujusmodi Auri (vocat' Guineas) se attingebat in valore ad viginti un' solid' & sex denar' quodque ad tunc ac præd' tempore confeccion' Arbitrij præd' prædicta Juditha erogavit & expendidit in & circa prosecucion' placiti præd' summam undecim libr' septem solid' & septem denar' videlicet apud ~~Clarefield~~ præd' Unde præd' Samuel postea scilicet primo die Augusti anno regni Regis & Reginae hunc primo apud ~~Clarefield~~ præd' habuit noticiam posteaque scilicet vicesimo die ejusdem Augusti apud ~~Clarefield~~ prædict' eadem Juditha requisivit eundem Samuel ad solvend' eidem Judithæ tam prædict' duodecim pecias Auri vel valor' inde quam prædict' undecim libr' septem solid' & septem denar' protestando autem quod prædict' Samuel non solvit eidem Judithæ prædict' summam undecim libr' septem solid' & septem denar' In factis eadem Juditha die' quod prædict' Samuel non solvit eidem Judithæ prædict' duodecim pecias Auri curat' (vocat' Guineas) seu valor' inde juxta forma & effectum Arbitrij illius Et hoc parat' est verificare Unde per Judicium & debitum suum præd' unacum dampnis suis occasione detenconis debiti illius sibi adjudicari &c.

Notice of the Award.

And requested the performance of it.

Et prædict' Samuel die' quod prædict' placitum prædict' Judithæ superius replicando placitat' ac materia in eodem content' minus sufficien' in lege existunt ad prædict' Judithæ ad accon' suam prædict' versus ipsi Samuel habend' manutene' quodque ipse ad placitum illud modo & forma præd' replicat' necesse non habet nec per legem terre tenetur aliquo modo respondere Et hoc parat' est verificare Unde pro defectu sufficien' replicaconis in hac parte Idem Samuel ut prius per Judicium Et quod prædict' Juditha ab accone sua præd' habend' præcludatur &c.

Demurrer to the Replication.

Et prædict' Juditha ex quo ipsa sufficien' materiam in lege ad acconem suam prædict' versus præfat' Samuel habend' manutene' superius replicando allegavit quam ipsa parat' est verificare Quam quidem materiam idem Samuel non dedic' nec ad eam aliquatenus respond' sed verificacon' ill' admittere omnino recusat ut prius per Judicium & debitum suum prædict' unacum dampnis suis occasione detenconis debiti ill' sibi adjudicari &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judicium inde reddant dies dat' est partibus prædict' hic usque à die Pasche in quindecim dies de audiendo inde Judicio eo quod iidem Justic' hic inde nondum &c.

Joyner in Demurrer.

Judith Hanson *versus* Liverledge.

In an Action of Debt upon a Bond, the Condition was to perform the Award of two Arbitrators in Writing, or by word of Mouth.

The Defendant pleaded *Nullum fecerunt arbitrium*.

The Plaintiff replies, That at the time of the Bond and Award she had an Action against the Defendant for scandalous Words, and that the Arbitrator did make, declare and publish their Award in manner and form following, (viz.) That the Defendant should pay to the Plaintiff 12 Guinea's, and all such Moneys as she had expended circa prosecutionem placiti prædicti; and that the parties should give mutual Releases of all Matters to the Date of the said Bond, and saith, that she laid out in the said Suit 11 l. 7 s. and demanded the said Sums of Money of the Defendant, and protestando that the Defendant had not paid her the 11 l. 7 s. dicit in fact that he had not paid the 12 Guinea's awarded, as aforesaid, & hoc parat' est verificare, &c.

To this the Defendant Demurred.

And Pemberton for the Defendant said,

First, This Award, as set forth, appears to be void; for 'tis to pay the Charges expended circa placit' præd', and the Award doth not mention any Suit before; and tho' the Plaintiff in her Inducement saith, That she had an Action for Words against the Defendant then depending, that will not help it, for that is no part of the Award; but the Award in the form as 'tis set forth is unintelligible, there being no Suit mentioned before to refer placit' prædict' unto.

Secondly, 'Tis not sufficient to Award payment of the Charges in such a Suit, it being altogether uncertain what the Sum will amount to.

Thirdly. It ought to have been shewn, that the Plaintiff had a Cause of Action in the Action that is mentioned to have been brought against the Defendant for Slander; and so is Spigurnell's Case in Siderfin 1st Part 12.

Curia. As to the first, if the Award were in Writing in such form of Expression, it could not be good; but he which sets forth an Award by Parol is not tyed to the words, for the precise words might be very difficult to prove; but 'tis sufficient to shew the effect and substance of what was awarded by Word of Mouth, and 'tis sufficiently shewn that this Award was made concerning that Action of Slander.

for the Second, the Court held, that the Award was good: for it may be easily reduced to a Certainty, when 'tis made appear what was laid out in that Suit, as in 1 Roll. Abr. 251. Beale and Beale, and in the 3 Cro. 383. to pay the Charges of such a Voyage held a good Award.

Thirdly, The Plaintiff need not shew that there was Cause of Action, for that is left to the Arbitrators, and they have power to award Charges thereupon, tho' in point of Law there were no Cause of Action; for the Parties have made the Arbitrators their Judges.

And the Court were not satisfied with the Opinion Reported by Syderfin in Spigurnell's Case, and said, he was then a young Reporter. Whereupon Judicium pro Quer'.

Major & probi homines de Guldeford *versus* Clarke.

Surr' ff. JOHANNES CLARKE nuper de Guldeford' in Com' prædict' Dyce Sum' fuit ad respondend' Majori & probis hominibus Villæ de Guldeford' in Com' Surr' de placito quod reddat eis viginti libras legalis monet' Angl' quas eis debet & injuste detinet &c. Et unde inde iidem Major & probi homines Villæ de Guldeford' præd' per Henr' Dyce Attorn' suum dic' quod cum prædict' Villa de Guldeford' in dicto Com' Surr' est antiqua Villa quodque probi homines ejusdem Villæ à tempore cujus contrarij memoria hominum non existit fuer' & adhuc existunt corpus Corporat' & Politicum in re facto & nomine per nomen Majoris & proborum homin' Villæ de Guldeford' in Com' Surr' & per idem nomen usi fuer' placitare & implacitari respondere & responderi Cumque etiam infra Vill' ill' habetur & à toto tempore supradict' cujus contrar' memoria hom' non existit habebatur talis consuetudo usitat' & approbat' quod Major & probi homines Villæ prædict' pro tempore existen' vel major pars eorundem in Com' Concil' congregat' & assemblat' usi fuer' & consuever' facere & constituere leges & constitucones pro bono regimine & gubernacone Villæ præd' & inhabitant' ejusdem & pœnas & pœnalitat' super personas contra leges & constitucones illi' delinquent' imponere Cumque etiam infra Villam prædict' fuit antiquus Officiarius annuatim & quolibet anno super diem Lunæ prox' post Festum Sancti Michaelis Archi' pro uno anno tunc sequen' per Majorem & probos homines præd' elect' (vocat' Balliv') ejusdem Villæ ad negotia ejusdem Villæ peragend' Cumque etiam præd' Major & probi homines Villæ præd' secundo die Octobris anno regni domini Caroli secundi nuper Regis Angl' &c. tricesimo quarto apud Vill' de Guldeford prædict' in Com' Consilio adtunc & ibidem congregat' & assemblat' ordina-

Debt upon a.
By Law made
by a Corpora-
tion by
Prescription.

Antiqua Villa.

A Corporation
time out of
Mind.
To implead
and be im-
pleaded.

A Custom to
make By-
Laws.

For good Go-
vernment of
the Corpora-
tion.
And to impose
Penalties.
Custom to elect
a Bayliff An-
nually.

The By-Law
set forth.

Forfeiture for
the Breach.

The Defendant
elected Bailiff.

For the year
then next
following.

The Defendant
refused to exe-
cute this Office.

The Defendant
pleads the Act
of Parliament
made 13 Car 2.
and that he
had not taken
the Sacrament
within a year
before his
Election, so
that he was
not capable
of his Office.

The Act set
forth.

ver' & stabiliver' quod si aliquis inhabitant' ejusdem Villæ tunc postea secundum antiquum usuag' & consuetud' ejusdem Villæ foret debite elect' ad officium Ballivi ejusdem Villæ & recusaret acceptare & super se suscipere idem officium Ballivi ejusdem Villæ sive idem Officium exequi quod tunc super vel recusacon' sive non acceptacon' ejusdem Officij quælibet tal' person' forisfaceret & solveret Majori & probis hominibus prædict' summam viginti librar' legalis monet' Angl' ad usum incorporacon' prædict' Cumque post consecracon' ordinacon' prædict' scilicet tricesimo die Septembris anno regni domini Willielmi & dominæ Mariæ nunc Regis & Reginæ Angl' &c. primo apud Villam de Guldeford prædict' præd' Johannes Clarke adtunc & diu antea & semper postea hucusque existen' inhabitant' infra eandem Villam & liber homo ejusdem Villæ secundum antiquum usuag' & consuetud' ejusdem Villæ per Majorem & probos homines ejusdem Villæ debite elect' fuit fore Ballivum ejusdem Villæ pro anno tunc prox' sequen' de quibus idem Johannes adtunc & ibidem notic' habuit & adtunc & ibidem requisit' fuit ad Officium ill' acceptand' & exequend' quodque idem Johannes adtunc & ibidem & abinde hucusque ad Officium ill' acceptand' & exequend' omnino recusavit & adhuc recusat per quod acço accrevit eidem Major' & probis hominibus Villæ de Guldeford' præd' ad exigend' & habend' de præfat' Johanne præd' viginti libr' præd' tamen Johannes licet sæpius requisit' prædict' viginti libr' præfat' Majori & probis hominibus Villæ de Guldeford' præd' nondum reddidit sed ill' eis hucusque solvere omnino contradixit & adhuc contradic' ad dampn' ipsorum Majoris & proborum homin' Villæ præd' decem librarum Et inde produc' sectam &c.

Et prædict' Johannes Clarke per Robertum Waring Attorn' suum ven' & defend vim & injur' quando &c. Et dicit quod præd' Major & probi homines Villæ de Guldeford' præd' acconem suam prædict' versus eum habere non debent quia dicit quod per quendam Actum in Parlamento domini Car' Secundi nuper Regis Angl' apud Westm' in Com' Midd' anno regni sui tertiodecimo tent' edit' & provis' inactitat' fuit Autoritate ejusdem Parlamenti inter al' quod Commissiones ante vicessimum diem Februarij tunc prox' emanat' forent sub Magno Sigillo Angl' talibus personis quales dictus nuper Rex appunctuaret p' execucone potestatum & autoritatum in eodem Actu postea express' & quod omnes & quælibet personæ nominat' Commissionar' in prædict' Commissionibus respective vigore prædicti Actus forent Commissionar' respective pro & infra sepeal' Civitates Corporacones & Burgos & Quinque-Portus & eorum Membra & al' Villas portus habentes (Anglicè ~~Port-Towns~~) infra Regn' Angl' Dom' Walliæ & Villam de Barwick super Tweedam pro quibus ipsi respective nominarentur & appunctuarentur Et ulterius per eundem Actum inactitat' existit Autoritate prædict' quod omnes personæ

personæ qui super vicesimum quartum diem Decembris Millesimo sexagesimo primo forent Majores Aldermanni Recordatores Ballivi Clerici Villi (vocat' Town-Clerk) homines de Communi Consilio (Anglicè Common Councilmen) & al' personæ tunc geren' aliquod officium vel officia Magistratus (Anglicè of Magistrates) sive locos vel fiducias vel al' negocium (Anglicè Employment) respicien' ad (Anglicè relating to) vel concernen' gubernaconem dictorum respectivorum Civitat' Corporac' & Burgor' & Quinque-Portuum & eorum Memborum & al' Villarum portus habentium ad aliquod tempus ante vicesimum quintum diem Martij Millesimo sexcentesimo sexagesimo tercio cum inde requirerentur per dictos respectivos Commissionarios vel aliquos tres vel plures eorum cape- rent Juramenta ligeancie & supremae & sacramentum in eodem Actu specificat' Ac etiam ad idem tempus publice subscriberent coram eisdem Commissionar' vel aliquibus tribus eorum Declaracon' in eodem Actu specificat' Et ulterius per eundem Actum inactitat' existit Autoritate p'd' quod p'd' respectivi Commissionar' vel aliqui tres vel plures eorum respective haberent potestatem durante conti- nuacione suarum respectivarum Commissionum administrare sacr' prædict' & offerre dictam declaraconem dictis personis per eundem Actum requisitis capere & subscribere eadem ab & post expiraconem dictarum respectiv' Commissionar' (præd' tribus sacr' & declaratione de tempore in tempus administrarentur & offerrentur talibus personæ & personis quales per veram intentionem ejusdem Actus vel alicujus Clausulæ in eodem content' capere deberent eadem per tales person' vel personas respective quales per Chartas vel Usuagia dictorum respectivorum Civitat' Corporacon' & Burgor' & Quinque Port' & Membor' suorum & aliarum Villarum portus habentium deberent administrare Sacramentum pro debita execucone dictorum locorum sive officiorum respective & in default talium per duos Justiciarios Pacis dict' Civitat' Corporacon' & Burgor' & Quinque port' & eorum Membor' & al' Villar' portus habentium pro tempore existen' si qui tales forent vel aliter per duos Justic' Pacis pro tempore existen' respectivorum Comitatu ubi p'dict' Civitates Corporacones vel Burgi sive Quinque portus vel eorum Membra vel al' Villæ portus habentes essent) Ac per eundem Actum ulterius inactitat' existit auctoritate prædict' quod ab & post expiracon' dictarum Commission' nulla persona sive nullæ personæ impofter' extunc postea locaretur elige- retur seu deligeretur (Anglicè should be Chosen) seu locarentur eli- gerentur seu diligerentur (Anglicè should be Chosen) in vel ad aliqua Officia vel loca prædict' quæ infr' unum annum ,px' ante talem elecon' vel delectcon' (Anglicè Choice) non cepisset seu cepissent Sacramentum Cœnæ Dominicæ secundum ritus Ecclesiæ Anglicanæ & quod quælibet talis persona & personæ sic locata electa vel delecta vel locata electæ sive delectæ similiter caperet seu caperent prædict' tria

tria sacramenta & subscriberent præd' declaracon' ad idem tempus quando Sacramentum p debita Execucone dictorum locor' & officior' respective administraretur Et in default inde quælibet tal' locatio elecco & delecto per eundem Actum inactitat' & declarat' existit fore vacua Et per eundem Actum ulterius inactitat' existit authoritate pd' quod potestates concess. dictis Commissionariis Virtute ejusdem Actus continuarent & essent in vigore usque viccesimum quintum diem Marcij anno Domini Millesimo sexcentesimo sexagesimo tertio & non longius prout per eundem Actum plenius apparet Et idem Johannes Clarke ulterius dic' quod ipse est & tempore præd' eleccionis ipsius Johannis fore Balliv' præd' Villæ de Guldeford' in Narracone præd' superius fieri supponit' fuit ptestan' Subditus dict' domini Regis & dominæ Reginæ nunc dissentiens ab Ecclesia Anglicana quodque ipse idem Johannes Clarke ad aliquod tempus infr' unum annum px' ante tempus Eleccion' ipsius Johannis fore Ballivum præd' Villæ de Guldeford' præd' per Narraconem præd' superius fieri supponit' non cepisset Sacramentum Cœnæ Dominicæ secundum ritus Ecclesiæ Anglicanæ per quod vigore præd' Statuti idem Johannes Clarke tempore Eleccionis præd' in Narracone præd' superius fieri supponit' fuit inhabil' & incapax fore eligend' ad præd' locum sive officium Ballivi Villæ de Guldeford' præd' & præd' elecco ipsius Johannis fore Ballivum ejusdem Villæ per Narraconem præd' superius supponit' vigore Actus præd' fuit vacua Et hoc parat' est verificare Unde per' Judicium si prædict' Major' & probi homines de Guldeford' prædict' acconem suam prædict' versus eum habere debeant &c.

The Defendant hath not taken the Sacrament within a year before his Election.

So that he is become incapable of it.

The Plaintiff Demurs.

Et prædicti Major & probi homines Villæ de Guldeford' præd' dicunt quod prædictum placitum ipsius Johannis superius in barram placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipsos Major' & probos homines Villæ de Guldeford' pd' ab accone sua prædicta versus præfat' Johannem habend' præcludend' quodque ipsi ad placitum illud modo & forma prædict' placitat' necesse non habent nec per legem terræ tenentur respondere Et hoc parat' sunt verificare Unde pro defectu sufficien' placiti ipsius Johannis iidem Major' & probi homines Villæ Guldeford' præd. pet' Judicium & debitum suum prædictum unacum dampnis suis occone detencionis debiti ill' sibi adjudicari &c.

The Defendant joyns in Demurrer.

Et prædict' Johannes ex quo ipse sufficien' materiam in lege ad pd' Major' & pbos homines Villæ de Guldeford' præd' ab accone sua prædict' versus ipm Johannem habend' præcludend' superius placitando allegavit quam ipse parat' est verificare Quam quidem materiam prædict' Major & probi homines Villæ de Guldeford' prædict' non dedic' nec ad eam aliqualit' respond' set verificacon' ill' admittere omnino recusant per' Judicium Et quod prædict' Major & probi homines Villæ de Guldeford' pd' ab accone sua præd' versus ipsum

ipsum Johannem habend' præcludentur &c. Et quia Justic' hic se advisare volunt de & super præmissis priusquam Judicium inde reddant dies dat' est partibus prædict' hic usque à die Sancti Michaelis in tres Septimanas de audiend' inde Judicio suo eo quod iidem Justic' hic inde nondum &c.

Major & probi homines de Guldeford' *versus* Clarke.

In an Action of Debt by the Mayor and probi homines of Gildford against Clarke, they declared upon a Prescription to make By-Laws p. bono Regim' & Gubernacōne Vill' pd', and that there has been an ancient Officer (called a Bayliff) of the said Town elected for time whereof, &c. upon the Monday next after Michaelmas Day, and they set forth a By Law made, That if any Inhabitant of the said Town should be duly Elected to the said Office of Bayliff, and should refuse to take it upon him, he should forfeit and pay to the Corporation 20 l. And that after the said Law made (viz.) upon the 30th of September, anno primo Willielmi & Mariæ, the Defendant then an Inhabitant and freeman of the said Town, was Chosen a Bayliff, according to ancient Usage for the year following, and had Notice thereof; but he refused to take upon him the said Office, unde actio accrevit Major' & prob' homin' for Twenty pounds, &c.

The Defendant pleaded Actio non; for that by the Statute made 13 Car. 2. for Regulating of Corporations, it was amongst other things Enacted, That after the determination and expiration of the Commission for Regulating of Corporations (in the said Act mentioned) no person or persons should for ever after be Chosen into any of the Offices or Places (before mentioned in the said Act,) who within One year next before such Election had not Received the Sacrament of the Lord's Supper, according to the Usage of the Church of England; and that every person Elected, should take the Oaths and subscribe the Declaration (in the said Act mentioned) at the same time as the Oath, for the due Execution of the Office he is Elected to shall be Administred; and in default thereof, every such Election to be void.

And the Defendant further said, That he is, and at the time of the said Election he was a Protestant Subject of the King and Queen, and a Dissenter from the Church of England, and that he had not Received the Sacrament within a year before the said Election, by reason whereof he was not capable to be Elected to the said Office, and the Election, by reason of the said Act, was void, & hoc parat' est verificare, &c.

So this Plea the Plaintiffs Demurred.

In

In the Argument of this Case, Sir John Read's Case was Cited, who several years since was made Sheriff of Hertfordshire, who was then under an Excommunication and so could not Receive the Sacrament; and therefore after he had held the Office for three Months, left off, and did not attend at the Assizes, for which he was fined 500 l. And after Argument in the Exchequer, where it was insisted on, that the Act of 25 Car. 2. made for preventing of Dangers that might arise from Popish Recusants, did abate the said Office upon his not having taken the Sacrament, and he was disabled to do it by reason of his Excommunication; yet he was Adjudged in the Court of Exchequer to pay the 500 l. fine.

But the Court held here, that the Matter pleaded by the Defendant was a good Bar; for in regard the Act of 13 Car. 2. had Enacted; That none should be Chosen, who had not Received the Sacrament within One year before such Choice; and there could be no Refusal before the Election, it was plain that the Defendant had not incurred the Penalty of the By-Law. And it differed from the Case of Sir John Read; for he was once actually in the Office, and obliged thereupon to do all things necessary for his proceeding in it: But here, in this Case, to make a Default in the Defendant there must have been an Election antecedent, and the Election of such an one as the Defendant is, is absolutely prohibited by the Statute.

There were also two Exceptions taken to the Declaration.

First, The By-Law is said to have been, That if any Inhabitant should be Chosen; whereas they cannot make By-Laws to bind all the Inhabitants of the Town, but only the Freemen or Members of the Corporation.

Secondly, The Writ is set forth, That the Election should be die Lunæ proxime post Festum Sancti Michael' Archi, and the Election of the Defendant is alledged to be upon the 30th of September; but it was not shewn that it fell upon the Monday, and that the Court can't take notice of it, or consult the Almanack, as this Case is, where it ought to have been set forth in pleading.

And the Court held these Matters incurable, and so Judgment was given for the Defendant.

Dawney

Dawney versus Vesey.

The Plaintiff as Executrix to William Dawney, her late Husband, brought an Action of Debt upon a Bond, wherein the Defendant was bound to the said Testator, with Condition to perform an Award.

The Defendant demanded Oyer of the Condition, and pleaded, That the Arbitrators made an Award, that the Defendant should pay 30 l. to the said William Dawney, or his Assigns, within two Months then next following, in full satisfaction of all Trespasses, Damages and Demands; and that the said parties upon payment of the said Money should give mutual Releases; and sheweth, that the said William Dawney after the said Award, and within two Months died, and demanded Judgment of the Action.

To this the Plaintiff Demurred.

And Judgment was given for the Plaintiff; for tho' the Money was awarded to be paid to William Dawney, and no mention of his Executors, yet the Money was to be paid to the Executors, for an Award creates a Duty.

And it was Objected, That if the Defendant should pay the Money, they could not compel the Plaintiff, who is Executrix, to Release.

The Court held, that she ought to release all Demands that the Testator had against the Defendant. Vide 1 Cro. 10. Kingwell and Knapman, 1 Ro. Rep. 197. 31 H.6. tit. Barre 59. 3 Leon. 12. 1 Roll. Abr. 420.

Harris versus Parker.

Midd'x ss. **S**AMUEL PARKER nuper de Staples Inn in Com' Midd' gen' Sum' fuit ad Respondend' Johanni Harris de placito quod reddat ei Nonagint' & novem libr' quas ei debet & injuste detinet &c. Et unde idem Johannes Harris per Johannem Wood Attorn' suum dicit quod cum præd' Johannes Harris primo die Maij anno regni domini Caroli secundi nuper Regis Angl' &c. Tricesimo quinto apud paroch' Sancti Martini in Campis in Com' Midd' prædict' dimississet concessisset & ad firmam tradidisset præfat' Samueli un' mesuag' sive tenementum cum pertin' continen' duas Romeas in una Area (Anglicè two Rooms on a floor) & dua gardina & un' latrinam (Anglicè a House of Office) eidem mesuagio spectan' & un' stabulum dictis duobus gardinis prox' adjungun' quæ præmissa prædict' sunt scituat' jacen' & existen' in & super acclivitatem de Hamstead Hill (Anglicè the Rise of Hamstead)

Debt for Rent upon two several Demises by Lease Parol.

The first Demise.

Exception.	stead) cum omnibus & singulis Edificiis structur' pomar' gardinis areis (Anglice Courts) curtilagiis viis aquis aquæcursibus boscis subboscis commun' Commun' Pastur' & turbar' esiamen' commoditat' pficuis emolumentis & advantagiis quibuscunque eisdem mesuag' & tenement' gardin' stabulis & præmiss' jacent' spectant' vel aliqualit' pertinent' vel cum eisdem tunc vel frequent' habit' & dimiss' occupat' vel petit' aut judicat' accept' reputat' cap't' vel cogn' fuisse ut pars parcel' sive membrum inde aut eisdem aliqualit' pertinent' (except' & semper reservat' præd' Johanni Harris Executoribus Administratoribus & Assign' suis omnibus tal' magnis arboribus (vocat' Timber Trees) qual' tunc steter' crever' & fuer' vel ad aliquod tempus postea starent crescerent vel forent in & super prædict' dimiss' præmiss' vel aliquam partem inde habend' & tenend' præmissa præd' (except' præexcept') eidem Samueli Parker & Assign' suis à vicesimo quinto die Marcij tunc ult' præterit' usque plenum finem & terminum septem annorum extunc prox' sequen' Reddend' inde eidem Johanni Harris annual' reddit' sive summam octodecem librar' legalis monet' Angl' solvend' eidem Johanni Harris ad Festa sancti Johannis Baptiste sancti Michaelis Archi' Natalis Domini Dei & Annunciacon' Beatæ Mariæ Virginis in quolibet anno per æquas & æquales porcones duran' toto termino annorum prædict' virtute cujus dimissionis prædict' Samuel Parker in præmiss' præd' prædimiss' cum pertin' intravit & ill' à prædict' primo die Maij anno tricesimo quinto supradict' usque ad Festum sancti Michaelis Archi' anno regni Jacobi secundi nuper Regis Angl' &c. quarto habuisset tenuisset & occupasset & quadraginta & quinque libr' de reddit' prædict' pro duobus annis & dimid' unius anni de præd' termino septem annorum finit' ad prædict' Festum sancti Michaelis Archi' anno quarto Jacobi secundi supradict' eidem Johanni Harris arretro fuer' & adhuc arretro existunt & insolut' per quod acco accrevit eidem Johanni Harris ad exigend' & habend' de præfat' Samuele Parker præd' quadragint' & quinque libr' de pd' nonagint' & novem libr' parcell' Cumque etiam prædict' Johannes Harris vicesimo quinto die Marcij anno regni dicti domini Caroli secundi nuper Regis Angl' &c. tricesimo quinto apud paroch' sancti Martini in Campis prædict' in Com' præd' dimississet concessisset & ad firmam tradidisset præfat' Samueli un' al' mesuag' sive tenement' cum pertinent' continen' duas romecas in una area (Anglice two Rooms on a f100) & duo al' gardin' & un' al' latrinam (Anglice a House of Office) eidem mesuagio ult' mentionat' spectant' & un' al' stabulum prox' adjungen' dictis duobus gardinis ult' mentionat' quæ præmissa prædict' ult' menconat' sunt scituat' jacent' & existen' in & super acclivitatem de Hampstead (Anglice the Hill of Hampstead Hill) cum omnibus & singulis edificiis structur' stabulis pomar' gardinis areis (Anglice Courts) curtilegiis viis aquæcursibus boscis subboscis commun' Common' pastur' turbar' esiamen' commoditat' proficuis emolu-
Habendum.	
Reddendum.	
Entry by virtue of the Demise.	
Rent arrear.	
Actio accrevit.	
The second Demise.	

emolumentis advantagiis quibuscunque eisdem mesuagio & tenemento
 gardinis stabulis & præmissis ult' menconat' jacen' spectan' vel aliqua-
 lit' pertinen' vel cum eisdem tunc vel frequent' habit' dimiss'. occu-
 pat' vel petit' aut judicat' accept' reputat' cap' vel cogn' fuisse ut
 pars parcell' sive membrum inde aut eisdem aliqualit' pertinen' ex-
 cept' & semper reservat' prædict' Johanni Harris Executoribus Ad-
 ministratoribus & Assign' suis omnibus tal' magnis arboribus (vocat'
Timber Trees) qual' tunc steter' crever' & fuer' vel ad aliquod
 tempus postea starent crescerent vel forent in & super prædict'
 dimiss' prædimiss' ult' menconat' vel aliquam partem inde Habend' &
 tenend' prædict' mesuag' & præmiss' ult' menconat' cum pertin'
 (except' præexcept') prædict' Samueli Parker à prædict' vicesimo
 quinto die Marcij anno Tricesimo quinto dicti domini Caroli secundi
 nuper Regis Angl' &c. ad voluntat' eorundem Johannis & Samuelis
 & quamdiu ambabus partibus prædict' placuerit reddend' & solvend'
 proinde prædict' Johanni Harris reddit' sive summam legalis monet'
 Angliæ ad ratam (Anglice *after the Rate*) octodecem librar' per
 annum duran' Continuacon' dimission' prædict' ult' menconat'
 Virtute cujus quidem dimissionis ult' menconat' idem Samuel
 Parker in præmiss' prædict' prædimiss' cum pertin' ult' men-
 conat' intravit & à tempore dimission' ill' ult' menconat' usque ad
 Festum sancti Michaelis Archi' anno regni domini Jacobi secundi
 nuper Regis Angl' &c. quarto habuisset & occupasset & quinquagint'
 & quatuor libr' de reddit' prædict' pro tribus annis finit' ad
 prædict' Festum sancti Michaelis Archi' anno quarto Jacobi secundi
 supradict' ad ratam (Anglice *after the Rate*) octodecem librar' p
 annum eidem Johanni Harris debet' arretro & insolut' fuer' & adhuc
 arretro & insolut' existunt per quod acco accrevit eidem Johanni
 Harris ad exigend' & habend' de præfat' Samuele Parker easdem quin-
 quagint' & quatuor libr' ult' menconat' de prædict' nonagint' &
 novem libr' resid' prædict' tamen Samuel' Parker licet sæpius requisit'
 &c. prædict' quadragint' & quinque libr' primo menconat' ac præd'
 quinquagint' & quatuor libr' ult' menconat' eidem Johanni Harris
 nondum reddidit nec aliquam inde parcell' set ill' ei hucusq; reddere
 omnino contradixit & adhuc contradicit Unde dicit quod deteriorat'
 est & dampnum ad valene' decem librar' Et inde pducit sectam &c.

Exception.

Habend.

Reddend.

Entry and possession.

Rent arrear.

Arrears accrevit.

Et prædict' Samuel per Carolum Townsend Attorn' suum
 venit & defendit vim & injur' quando &c. Et dicit quod prædict'
 Johannes Harris acconem suam prædict' versus eum habere non de-
 bet Quia dicit quod prædict' Johannes Harris tempore dimission'
 prædictarum superius fieri suppoit' nichil habuit in tenementis præd'
 cum pertin' unde suppon' dimission' ill' fieri Et hoc parat' est veri-
 ficare Unde petit Judicium si prædict' Johannes Harris acconem
 suam præd. versus eum habere debeat &c.

The Defendant
 pleads, that
 the Plaintiff
 nihil habuit in
 tenementis
 tempore dimis-
 sionis.
 He should have
 said temporibus
 dimissionis.

The Plaintiff
Replies, that
before the De-
mises one J. S.
demised to him
for a Term
for years.

J. S. demised
to him.

For 41 years.

J. S. having
then good
Right and
Title to make
such Demise.

Entry and
possession.

And demised
to the Descen-
dant.

The Defendant
demurs to the
Plaintiff's
Replication.

Et prædict' Johannes Harris dicit quod per aliqua per prædict' Samuellem Parker superius placitando allegat' ipse idem Johannes ab accone sua præd' versus cum habend' præcludi non debet Quia dicit quod diu ante tempora prædict' sepeal' dimission' per ipsum Johannem præfat' Samueli de tenementis prædict' superius in Narracone prædict' menconat' esse fact' scilicet decimo tertio die Novembris anno regni Caroli secundi nuper Regis Angl. vicesimo sexto Prænobilis Carolus Henricus dominus Wotton Baro de Wotton in Com' Kane apud paroch' sancti Martini in Campis in Com' Midd' præd' dimisit concessit & ad firmam tradidit præfat' Johanni un' peciam sive parcell' terræ unacum antiquo mesuagio & horreo existen' superinde scituat' & existen' in Dampstead præd' in Com' prædict' continen' dimidium unius acrae terræ cum pertinen' unde tenement' præd' in Narracone præd' menconat' fore dimissa sunt parcell' Hab' & tenend' præmiss' ill' præfat' Johanni Harris Executoribus & Assign' suis à Festo sancti Michaelis Archi' tunc ult' præterit' usque ad plenum finem & terminum quadraginta & unius annorum extunc prox' sequen' plenar' complend' & finiend' præfat' (Carolo Henrico domino Wotton adtunc & ibidem plenam potestatem jus & titulum ad prædict' peciam & parcell' terræ & præmiss' prædict' cum pertinen' dimittend' & concedend' p' prædict' termino quadraginta & unius annorum habente) Virtute cujus quidem dimissionis idem Johannes Harris postea scilicet eodem decimo tertio die Novembris anno regni dicti dñi Caroli secundi Regis vicesimo sexto in prædict' peciam sive parcell' terræ mesuag' & horreum cum pertinen' intravit & fuit inde possessionat' pro residuo prædict' termini quadraginta & unius annorum Et sic inde possessionat' existen' idem Johannes primo die Maij anno regni dicti dñi Caroli Regis tricesimo quinto in Narracone præd' superius menconat' apud paroch' sancti Martini in Campis prædict' in Com' prædict' dimisit præfat' Samueli tenementa prædict' in Narracone prædict' superius menconat' cum pertinen' modo & forma prout idem Johannes superius versus cum Narravit Et hoc parat' verificare Unde petit Judicium & debitum suum prædict' unacum dampnis suis occone detencionis debiti illius sibi adjudicari &c.

¶ Et prædict' Samuel die' quod prædictum placitum prædict' Johannis superius Replicando placitat' materiaque in eodem content' minus sufficien' in lege existunt ad prædict' Johannem acconem suam præd' habend' manutenend' quodque ipse ad placitum illud modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde p' defectu sufficien' Rep' ipsius Johannis in hac parte idem Samuel petit Judicium Et quod prædict' Johannes ab accone sua prædict' versus cum habend' præcludatur &c.

Hen. Irinder.

Et

Et prædict' Johannes dicit quod placitum prædict' per ipsum Johannem modo & forma prædict' superius Replicando placitat' materiaque in eodem content' bon' & sufficien' in lege existunt ad prædict' Johannem acconem suam prædict' habend' manutenend' Quod quidem placitum materiaque in eodem content' ipse idem Johannes parat' est verificare & probare prout Cur' &c. Et quia prædict' Samuel ad placitum ill' non Respond' nec ill' hucusque aliqualit' dedic' ipse idem Johannes petit Judic' & debitum suum prædict. unde cum dampnis suis occone detenconis debiti præd' sibi adjudicari &c. Sed quia Cur' hic de Judicio suo de & super præmissis reddend' nondum advisatur Dies inde dat' est partibus prædict' coram Justic' domini Regis & dominæ Reginæ apud Westm' usque de Judicio suo de & super præmissis ill' audiend' eo quod Cur' hic nondum inde &c.

The Defendant
joins in De-
murrer.

Harris versus Parker.

In an Action of Debt for Rent the Plaintiff declared, That he demised at the Parish of St. Martin in the Fields in the County of Middlesex, to the Defendant a Messuage Barn and Gardens, with a Stable adjoining que premissa præd. sunt Scituat' jacen. & existen. in & super acclivitatem de Hampstead (Anglicè) the rise of Hampstead Hill, to hold to the Defendant for seven years at 18 l. per annum Rent, &c. and declared of another Demise at St. Martins aforesaid, of another Messuage, &c. Scituat' as aforesaid, to the Defendant, to hold at Will at the like yearly Rent, &c. and for 90 l. set forth to have been due upon the said several Demises; he brings the Action.

The Defendant pleaded, That the Plaintiff tempore dimissionum præd. nihil habuit in Tenementis præd.

The Plaintiff replied, That ante tempora prædict' sepeal. Dimisit the Lord Wotton dimised to the Plaintiff, the said Messuage and Premises for the Term of one and forty years (ipso Dom. Wotton plenam potestatem jus & titulum ad premissa & ea dimittendi pro Terminis præd. habente) and that the Plaintiff did enter by virtue of the said Dimise; and being possessed of the Premises made the several Dimises to the Defendant prout, &c.

To this the Defendant Demurred:

For that the Plaintiff in his Replication hath set forth no Title in the Lord Wotton; nor shewn what Estate he had, or that he had any Estate.

As to that the Court inclined, that the Replication was well enough. but they took the Bar not to be well pleaded; for the Plaintiff declared of two Dimises, and the Bar is, that tempore dimissionum præd. nihil habuit; whereas it ought to have been distinctly

distinctly pleaded, that he had nothing at the time of either of the Dimisses, for the Declaration is of two Dimisses, and the time being put in the singular number it cannot be carried to both, and tis not like pleading Non Assumpsit to a Declaration, containing several promises, vide Palmers Rep. A Quo Warranto was brought against a Corporation for several franchises, and they pleaded a Prescription to one, and a Charter as to another, &c. and concluded eo Warr. Clamant; and that was held good, and so Judgment there was given for the Plaintiff nisi causa.

But then it was moved at another day, that the Declaration was not good for the Messuage and Premises dimissed, for they are said here to be Scituate in & super acclivitat' de Hampstead, which is a description of the Scituation; but here is no Vill laid or lieu conus for a Jury, and of this the Court doubted. Postea.

Every *versus* Carter.

*Indebitatus
Assumpsit upon
several Pro-
mises.*

*For Moneys
had and re-
ceived to the
Plaintiffs use.*

*For Money
laid out for
the Defendant.*

*For Money
borrowed of
the Plaintiff.*

Staff. ff. JOHANNES CARTER nuper de Burton super Trent in Com' prædict' Dyet Attach' fuit ad respondend' Johanni Every Armig' de placito Transgr' super Casum &c. Et unde idem Johannes Every per Isaacum Hawkins Attorn' suum Queritur quare cum prædict' Johannes Carter primo die Marcij anno regni dominorum Regis & Regin' nunc &c. primo apud Tutbury indebitat' fuisset eidem Johanni Every in Cent' nonagint' & quinque libr' legalis monet' Angl' p' denar' p' eodem Johanne Every & ad ejus usum per prædict' Johannem Carter ante tempus ill' habit' & recept' & sic inde indebitat' existen'. Idem Johannes Carter in cons. inde super se assumpsit & eidem Johanni adtunc & ibidem fidelit' promisit quod ipse Johannes Carter prædict' Centum nonagint' & quinque libr' eidem Johanni Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam idem Johannes Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury prædict' indebitat' fuisset eidem Johanni Every in ducent' libris similis legalis monet' Angl' pro denar' pro præd' Johanne Carter & ad ejus instanc' & requisiconem per prædict' Johannem Every ante tempus ill' deposit' & solut'. Et sic inde indebitat' existen' idem Johannes Carter in Cons. inde super se assumpsit & eidem Johanni Every ad tunc & ibidem fidelit' promisit quod ipse idem Johannes Carter prædict' ducent' libr' ult' menconat' eidem Johanni Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam præd' Johannes Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury prædict' indebitat' fuisset eidem Johanni Every in vigint' libr' legalis monet' Angl' pro denar' de eodem Johanne Every per prædict' Johan' Carter ante

ante tempus ill' habit' mutuat' & recept' & sic inde indebitat. existen' idem Johannes Carter in Conf. inde super se assumpsit & eidem Johanni Every adtunc & ibidem fidelit' promisit quod ipse Johannes Carter prædict' vigint' libr' eidem Johanni Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam præd' Johannes Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury prædict' indebitat' fuisset eidem Johanni Every in Centum libr' similis legalis monet' Angl' pro arrearagiis debet' eidem Johanni Every per præd' Johannem Carter super quodam Compō int' eundem Johannem Every & prædict' Johannem Carter ante tempus ill' habit' & fact' & sic inde indebitat' existen' Idem Johannes Carter in Conf. inde super se assumpsit & eidem Johan' Every adtunc & ibidem fidelit' promisit quod ipse idem Johannes Carter prædict' Cent' libr' eidem Johanni Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet prædict' tamen Johannes Carter prædict' sepeal' promission' ac assumpcon' suas præd' miē curans sed machinans & fraudulent' intendens eundem Johan' Every in hac parte callide & subdole decipere & defraudare præd' sepeal' denar' summas eidem Johanni Every nondum solvit nec ipsum pro eisdem aliqualit' hucusque contentavit licet adinde idem Johannes Carter postea scilicet secundo die Marcij anno regni dictorum dominorum Regis & Regin' nunc &c. primo & sepius postea apud Tutbury præd' per prædict' Johan' Every requisit' fuisset sed ill' ei solvere aut aliqualit' pro eisdem contentare omnino hucusque recusavit & adhuc recusat ad dampnum ipsius Johannis Every sexcent' libr' Et inde producit' sectam &c.

For Money due to the Plaintiff, for the arrears of an Account.

The Defendant now follows the several Sums.

Et prædict' Johannes Carter per Thomam Porter Attorn' suum ven' & defend' vim & injur' quando &c. Et quoad primam & secundam promission' & assumpcon' superius menconat' dic' quod prædict' Johannes Every acconem suam prædict' inde versus eum habere non debet quia dic' quod ipse idem Johannes Carter ad aliquod tempus infra sex annos ante diem impetraconis brevis Originalis ipsius Johannis Every non assumpsit super se modo & forma prout prædict' Every superius versus eum queritur Et hoc parat' est verificare Unde per' Judicium si prædict' Johan' Every acconem suam prædict' inde versus eum habere debeat &c. Et quoad tertiam & quartam promission' & assumpcon' in Narracone superius menconat' idem Johannes Carter dicit quod ipse non assumpsit super se modo & forma prout prædict' Johan' Every superius inde versus eum queritur Et de hoc pon' se super patriam & prædict' Johan' Every similiter &c.

As to the first and second Promises, the Defendant pleads Non Assumpsit infra sex annos.

As to the third and fourth Promises he pleads Non Assumpsit.

Et

As to the first
and second
Promises the
Plaintiff Re-
plies and sets
forth an Ori-
ginal sued out
in a *Clausum*
fregit within
the six years.

The going out
of the Ori-
ginal.

Ea intentione
to Declare
against him.

And that he
promised within
the six years.

The Defendant
craves Oyer of
the Original.

And hath it.

This Writ will
not warrant
this Declara-
tion.

Et prædict' Johannes Every quoad prædict' placitum prædict' Johannis Carter quoad primam & secundam pmission' & assumpton in Narr' prædict' superius menconat' dicit quod ipse per aliqua in eodem placito præallegat' ab accon' sua prædict' inde versus eum habend' præcludi non debet quia dic' quod ipse idem Johan' Every post promission' & assumpton' prædict' in forma præd' fact' scilicet undecimo die Maij anno regni domini Jacobi secundi nuper Regis Angl' secundo pro recuperacon' dampnorum suorum occon' non per- formacon' promission' & assumpton' ill' prosecut' fuisset extra Cur' Cancellar' dicti nuper domini Regis quoddam breve Original' dicti nuper Regis in hac parte versus prædict' Johan' Carter tunc Vic' Com' Stafford' direct' retornabil' coram tunc Justic' dicti nuper Regis apud Westm' in Crastino sanctæ Trinitatis tunc prox' sequen' respondend' eidem Johan' Every ea intentione quod prædict' Johan' Carter caperetur & arrestaretur & idem Johan' Every super com- parent' prædict' Johan' Carter in eadem Cur' ad sectam ejusdem Johan' Every pro recuperacon' dampnorum suorum occone non performacon' promission' & assumpton' ill' superius menconat' narraret quodque prædict' Johan' Carter infra sex annos prox' ante diem impetraconis ejusdem brevis Original' in hac parte assumpsit super se modo & forma prout idem Johan' Every superius versus eum queritur Et hoc pet' quod inquiratur per patriam.

Et prædict' Johannes Carter pet' auditum prædict' brevis Original' præfat' Johan' Every superius replicando menconat' Et ei legitur in hæc verba Jacobus secundus Dei gratia Angl' Scotiæ Franciæ & Hiberniæ Rex Fidei defensor &c. Vic' Staff. salutem Si Johan' Every Armig' sec' te secur' de clausum suo pros' tunc pone per vad' & salvos pleg' Johan' Carter nuper de Burton super Trent in Com' tuo Dyet quod sit coram Justic' nostris apud Westm' in Crastino sanctæ Tri- nitatis ostens' quare Vi & armis clausum ipsius Johan' Every apud Tutbury fregit Et al' enormia ei intulit ad grave dampnum ipsius Johannis Every & contr' pacem nostram & habeas ibi nomina pleg' & hoc breve Teste meipso apud Westm' 11 die Maij anno regni nostri secundo, Elwes. Johan' Doe pleg' de prof. Richardus Roe Infra nominat' Johan' nichil habet in balliva mea per quod Attach' potest Jonath' Cope Arm' Vic' Quo lecto & audito idem Johan' Carter dic' quod prædict' Johan' Every ad monstrand' idem breve Originale superius replicando menconat' ad Warrantizandum Narraconem suam prædict' modo versus eundem Johan' Carter fact' & declarat' admitti seu recipi non debet Quia dic' quod breve Original' unde prædict' Johan' Every superius modo Narravit est de placito quare cum præd' Johan' Carter primo die Marcij anno regni dominorum Regis & Regin' nunc &c. primo apud Tutbury inebitat' fuisset eidem Johan' Every in Cent' nonagint' & quinque libr' legalis monet' Angl' pro denar' pro eodem Johan' Every & ad ejus usum per prædict' Johan' Carter

Carter ante tempus ill' habit' & recept' & sic inde indebitat' existen' idem Johan' Carter in Conf. inde super se assumpsit & eidem Johan' Every adtunc & ibidem fidelit' promisit quod ipse idem Johan' Carter prædict' Centum nonaginta & quinque libras eidem Johan' Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam idem Johan' Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury prædict' indebitat' fuisset eidem Johanni Every in ducent' libris similis legalis monet' Angl' pro denar' pro prædict' Johan' Carter & ad ejus instanc' & requisitionem per præd' Johan' Every ante tempus illud deposit' & solut' & sic inde indebitat' existen' idem Johan' Carter in Conf. inde super se assumpsit & eidem Johan' Every adtunc & ibidem fidelit' promisit quod ipse idem Johan' Carter præd' ducent' libras ult' menconat' eidem Johan' Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam præd' Johan' Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury præd' indebitat' fuisset eidem Johan' Every in viginti libr' legal' monet' Angl' pro denar' de eodem Johan' Every per præd' Johan' Carter ante tempus ill' habit' mutuat' & recept' & sic inde indebitat' existen' idem Johan' Carter in Conf. inde super se assumpsit & eidem Johan' Every adtunc & ibid' fideliter promisit quod ipse idem Johan' Carter præd' viginti libras eidem Johan' Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam præd. Johan' Carter postea scilicet eisdem die & anno ult' menconat' apud Tutbury præd' indebitat' fuisset eidem Johan' Every in Centum libris similis legalis monet' Angl' pro arreragiis debet' eidem Johan' Every per præd' Johan' Carter super quodam Compō int' eundem Johan' Every & præd' Johan' Carter ante tempus ill' habit' & fact' & sic inde indebitat' existen' idem Johan' Carter in Conf. inde super se assumpsit & eidem Johan' Every adtunc & ibidem fidelit' promisit quod ipse idem Johan' Carter prædict' Centum libras eidem Johan' Every cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet præd' tamen Johan' Carter soperat' promission' & assumpcon' suas præd' minime curans sed machinans & fraudulent' intendens eundem Johan' Every in hac parte calide & subdole decipere & defraudare præd' denar' summas eidem Johan' Every nondum solvit nec ipm pro eisdem aliqualit' hucusque contentavit licet adinde idem Johan' Carter postea scilicet secundo die Marcij anno regni dictorum dominorum Regis & Regin' nunc &c. primo & sæpius postea apud Tutbury præd' per præd' Johan' Every requisit' fuit sed ill' ei solvere aut aliqualit' pro eisdem contentare hucusque omnino recusavit & adhuc recusat ad dampnum ipsius Johan' Every sexcentarum librarum &c. Ad quod quidem breve Original' ipse præd' Johan' Carter in Cur' hic ad sectam præd' Johan' Every comparens præd' Johan' Every superinde versus eundem Johan' Carter

And prays
Judgment,
whether the
Plaintiff shall
be admitted
to set forth
that Writ.
The Plaintiff
Demors to the
Rejoynder.

de præd' placito in eodem brevi Original' ult' spec' narravit & non super brevi Originali præd' per prædictum Johannem Every superius replicando supponit' Et hoc parat' est verificare unde pet' Judicium si prædict' Johannes Every ad monstrandum prædictum breve Originale superius replicando menconat' ad Warrantizandum Narracon' suam prædict' modo versus eundem Johan' Carter fact' & declarat' admitti seu recipi debeat &c.

Et prædicti Johannes Every dicit quod placitum prædictum p' prædict' Johannem Carter modo & forma prædict' superius rejun- gendo placitat' materiaque in eodem content' minus sufficien' in lege existunt ad quod ipse idem Johan' Every necesse non habet nec per legem terræ tenetur aliquo modo respondere Et hoc parat' est verificare Unde pro defectu sufficien' rejunctōn' in hac parte ipse idem Johannes per' Judicium & dampna sua occon' non performacon' promissionem & assumpconem ill' sibi adjudicari &c.

The Defendant
joyns in De-
murrer.

Et prædict' Johannes Carter ex quo ipse sufficien' materiam in lege ad præfat' Johan' Every ab accone sua prædict' versus eum præcludend' superius allegavit quam ipse parat' est verificare Ac quam quidem materiam prædict' Johannes Every non dedic' nec ad eam aliqualit' respond' sed verifacōn' ill' admittere omnino recusat ut prius pet' Judicium Et quod prædict' Johannes Every ab accone sua prædict' inde versus eum habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super præmiss. inde partes prædict' posuer' se in Judicium Cur' priusquam Judicium inde red- dant dies dat' est partibus prædict' hucusque à die Sancti Michaelis in tres Septimanas de audiendo inde Judicio suo eo quod iidem Justic' hic inde nondum &c. Et tam quoad triand' exitum præd' inter partes prædict' superius junct' per patriam triand' quam ad inquirend' quæ dampna prædict' Johan' Every sustinuit occone præmiss. superius menconat' unde partes præd' posuer' se in Judicium Cur' si contingat Judic' inde pro præd' Johan' Every versus præfat' Johannem Carter inde reddi Præcept' est Vic' quod Venire fac' hic à die Sanctæ Trinitatis in tres Septimanas duodecim &c. per quos &c. Et qui nec &c. Ad recogn' &c. quia tam &c.

Every

Every *versus* Carter.

In an indebitat' Assumpsit, the Plaintiff declared upon several Promises.

The Defendant pleaded the Statute of Limitations.

The Plaintiff replied, That before the six years were elapsed he prosecuted an Original against the Defendant, Returnable coram tunc Justiciariis Jacobi secundi nuper Dom. Regis apud Westm. ad respondend' eidem Johanni Every *ea intentione quod præd. Johannes Carter capiatur* Et idem Johannes Every super comparentiam præd. Johannis Carter in eadem Cur' ad sectam ipsius Johannis pro recuperatione damnor' suor' occasione non performance promiss' illor' superius mentionat' narraret quodque præd. Johannes Carter infra sex annos proxime ante diem impetrationis ejusdem brevis Original' in hac parte Assumpsit super se modo & forma prout, &c. Et hoc petit quod inquiratur per patriam.

Et præd' Johannes Carter petit audire præd' brevis Original' & ei legitur in hæc Verba Jacobus secundus, &c. Vicecom' Staff' salutem Si Johannes Every Ar' fec' te securum de clamore suo proseguend' tunc pon' per vadios & salvos plegios Johannem Carter, &c. quod sit coram Justiciariis nostris apud Westm', &c. ostens' quare vi et armis clausum ipsius Johannis Every, apud Turbury fregit & alia enormia ei intulit ad grave damnum, &c. Quo lecto & audito idem Johannes Carter dicit quod præd' Johannes Every ad monstrand' idem breve Original' superius replicando mentionat' ad Warr' narrationem suam præd' modo versus eundem Johannem Carter fact' admitti seu recipi non debet quia dicit quod breve Original' unde præd' Johannes superius modo narravit est de placito quare cum præd' Johannes Carter indebitatus fuisset eidem Johanni Every, &c. ad quod quidem breve Original' ipso eodem Johanne Carter in Cur' hic comparente præd' Johannes Every superinde versus eund' Johannem Carter de placito in eodem brevi Original' ult' specificat' narravit & non super breve Original' præd' per præd' Johannem Every superius replicando mentionat' ad Warrantizand' Narr' præd' & hoc parat' est verificare unde petit Judic', &c.

So this the Plaintiff Demurred; for it was said, that it was according to the course which of late time had obtained in this Court, to declare in any Action upon a Clausum fregit, as they do upon a Latitat in the Kings Bench.

The Court agreed, it was the practise now settled in the Court, to take out such Original in a Clausum fregit, and to declare super Assumpsit or the like; but whether this were sufficiently set forth in the Plaintiffs Replication, for he mentions nothing of the course of the Court, but that he prosecuted such a Writ *ea intentione* to

declare; And the Court being informed that there were a great many Presidents in this manner, the Court appointed them to be looked into. Et Adjournatur.

Lade versus Barker.

In Replevin the Plaintiff declared of a taking at a place called the 14 Acres at Barham in Kent: The Defendant avowed, for that Robert Lade being seised in Fee of the said 14 Acres by Indenture between him and Nicholas Marsh, in Consideration of One hundred pounds paid unto him by the said Nicholas, granted a Rent of 8 l. per Annum, to the said Nicholas and his Heirs out of the Premises, with power to distrain; and the said Nicholas being seised in Fee of the said Rent, by his Will in Writing devised the said Rent to Richard Marsh, Son of the said Nicholas, and his Heirs, and died seised as aforesaid Anno, 1675. And the said Richard Marsh being seised in Fee of the said Rent, by Virtue of the said Devise by Indenture dated the 10 of Aug. 32. Car. 2. nuper Regis, between him the said Richard of the one part, and Nicholas Marsh Son of the said Richard of the other part, which Indenture the Defendant produced in Court, in Consideration of a natural Love to the said Nicholas his Son, and 5 l. in Money to be paid Annually to the said Richard during his Life; he did give and grant to the said Nicholas Marsh, his Heirs and Assigns, the said Rent of 8 l. per Annum, to the use of the said Nicholas Marsh his Heirs and Assigns. And then the Defendant saith further in this manner, Quæ quidem concessio ult' mentionat' nullo attornamento vel alia Executione superinde fact' existen' præter solam sigillationem & deliberationem inde operavit per viam conventionis præd' Richardi Marsh, stare seisis' ad usus in eadem concessione mentionat' per quod & vigore Statuti fact', &c. de usibus in Possessionem transferen' præd' Nicholaus Marsh fuit & adhuc est seisis' de præd' annuitate octo librarum in Dominico suo ut de feodo; and for 4 l. Arrear of the said Rent as Bayliff to the said Nicholas Marsh, he makes Confessans, &c.

To this the Plaintiff Demurred.

First, This is a Grant by Richard to Nicholas, and so void without Attornment or Enrollment, and being intended to Enure as a Grant, shall, not work as a Covenant to stand seised.

Secondly, The Defendant hath pleaded it as a Grant; and what he saith after in the Avowry, to set forth how the Deed should work is vain and idle.

As

As to the first Point, the Court held, this Deed having no Execution to make it work as a Grant, it shall operate as a Covenant to stand seised, Mod. Rep. 178. Sanders and Savins Case. A Grant of a Rent to his Kinsman for Life, there being no attornment, it raised an use by way of Covenant; but the pleading the Court held impertinent, for instead of pleading of this Grant according to the effect of it in Law. (viz) As a Covenant to stand seised, He sets forth the matter in Law, and how it ought to be construed, and because they would not countenance such vain and improper pleading, the Case was adjourned.

Biddulph versus Dashiwood.

IN an Action of Debt for 90 l. The Plaintiff declared, quod cum recuperasset coram Justiciariis de Banco apud Westm' 90 l. p' dam' against the Defendant; prout p' Record & process' quæ Dom' Rex & Regina coram eis causa Erroris in eisd' corrigend' Venire fac' & quæ in Cur' dicti Domini Regis & Dom' Regine in pleno robore & vigore remanent minime revocat' plen' apparet per quod actio accrevit, &c.

To this the Defendant Demurred, supposing that the Judgment was suspended so far that an Action of Debt could not be brought upon it, pending the Writ of Error: But the Court held, if the Defendant could insist upon this he ought not to have Demurred; but to have pleaded Specially, and demanded Judgment, if the Plaintiff should be answered pending the Writ of Error. So Judgment was given for the Plaintiff.

Termino

**Termino Sancti Hillarij, Anno 2 & 3 W. & M.
In Communi Banco.**

T Respass quare clausum fregit & diversas petias Maheremij cepit, &c. Judgment by default; upon the Writ of Enquiry returned, The Judgment was stayed for the incertainty of the Declaration.

James Tregonwell, Vid. Executrix of John Tregonwell against

In an Action of Debt for Rent, the Plaintiff declared in this manner, That Frances Fen and John Tregonwell the 2^d of Jan. 24. Car. 2. did demise to the Defendant certain Lands for 21 years, reserving 20 l. per Annum to the said Frances during her Life, and after her Decease to the said Tregonwell, his Executors and Administrators, and set forth Frances to be Dead; and that the said Tregonwell being possessed of the Reversion of the Premises, pro Termino Annorum & adhuc ventur' the 4th of May 30 Car. 2. made his Will, and thereof made the Plaintiff his Executrix and died, and that she took the Executrixship upon her, and by vertue thereof became possessed of the said Reversion, and for 30 l. for a year and halfs Rent accruing after, she brought the Action.

The Defendant pleaded an insufficient Plea, and the Plaintiff Demurred.

And Judgment was given against the Plaintiff upon the insufficiency of the Declaration, for there is no good Title set forth to the Plaintiff for the Rent; for tis not said that Tregonwell was at the time of the Lease, possessed of the Lands pro Termino Annorum, &c. but that at the time of making his Will, and that might be upon the creating of such Estate since, and the Rent might not belong to the Reversion: And tho' it was said his reserving the Rent to his Executors carried an intendment, that he had a Term for years only; yet that was held not to be sufficient, and Judgment was given for the Defendant.

Sir

Sir Lionel Walden *versus* Mitchell.

Hunt' A. **J**OHANNES MITCHELL nuper de Huntington in Com' præd' Bailliff Attach' fuit ad respondend' Lionello Walden Mil' de placito Transgr' super Casum Et unde idem Lionellus per Robertum Clarke Attorn' suum queritur quare cum præd' Lionellus bonus verus pius fidelis & honestus subditus & ligeus domini Regis & dominæ Reginæ nunc existit ac ut bonus verus pius fidelis & honestus subditus & ligeus eorundem domini Regis & dominæ Reginæ nunc & pgenitorum suorum à tempore Nativitat' suæ hucusque se habuit gessit & gubernavit bonorumque nominis famæ conversationis & gesture tam int' quam plurimos venerabiles & fideles subdit' dictorum domini Regis & dominæ Reginæ nunc & pgenitorum suorum quam omnes vicinos suos per tot' tempus præd' habit' not' & reputat' fuerat & per tot' tempus præd' fuit & adhuc existit verus professor Religionis Protestant' & Reformat' per leges hujus regni Angliæ stabilit' ill' sincere proficiend' & exercen' & Divina Servicia in Ecclesia in paroch' sua seu aliqua Ecclesia capello aut alio usuali loco Communis præcacon' secundum usum Ecclesiæ Anglicanæ lect' semper frequentans & audiens & Ecclesiæ Romanæ nunquam reconciliat' fuit neque Religionem Romanam unquam professus fuit neque ad Missam unquam ivit Cumque præd' Lionellus fuit & extit' un' Burgens' sive Membr' Parliamenti pro Villa de Huntingdon in Com' Hunt' in Parlamento domini Caroli secundi nuper Regis Angliæ inchoat' & tent' apud Westm' in Com' Midd' octavo die Maijanno regni sui decimo tertio & ut hujusmodi Burgens' sive Membr' Parliamenti per tot' idem Parliament' usque dissolucon' inde juste & fidelit' defervivit & debitum fiduciæ & officij sui Burgens' & Membr' ejusdem Parliamenti per tot' idem tempus performavit Idemque Lionellus pro performacone fiduciæ officij sui prædict' Burgens' sive Membr' Parliamenti prædict' & alijs Causis diversa itinera ad Civitat' London' & Westm' à Villa Hunt' prædict' fecit & performavit præd' tamen Johan' præmissorum non ignarus set machinans & malitiose intendens eundem Lionellum non solum in bonis nomine fama credenc' & reputacone suis prædict' multipliciter lædere defrahere & penitus destruere verum etiam ipsum Lionellum infra pœnas & pœnalitat' contra Papistas & subdit' hujus regni qui Missam frequentant vel audiunt per Statut' hujusmodi regni Angliæ inde edit' & provis' inferre causare octavo die Decembr' Anno Domini Millesimo sexcentesimo octogesimo octavo apud Hunt' prædict' in Com' Hunt' præd' Colloquium habens cum quodam Thoma Waddington tunc Servien' ipsius Lionelli in aperto & publico Mercato ibidem tunc tent' de & concernen'

Actions for Words, viz. Papist and Penfamer, spoken of one who had been a Member of Parliament at the time of King Charles the Second.

The Plaintiff a Protestant.

And never a Professor of the Romish Religion.

That he hath been a Member of Parliament.

And did his Duty therein justly.

Colloquium.

Of the Plaintiff,
and of his
being a Mem-
ber of Parlia-
ment.

The first words.

Ex ulteriori
malitia.

Other words.

concernen' eodem Lionello & Religione sua & de ejus existen' un' Burgens' five Membr' Parliament' præd' pro Villa de Hunt' prædict' in præsentia & auditu quamplurimarum person' in eodem publico Mercato adtunc & ibidem congregat' & præsen' existen' hæc falsa ficta scandalosa Anglicana verba sequen' præfat' Thomæ Waddington servien' ipsius Lionelli tunc & ibidem existen' de eodem Lionello falso & malitiose palam & publice dixit retulit propalavit & alta voce publicavit & pronunciavit (videlicet) Your Master (ipsum Lionellum innuendo) is a Papist; when he (ipsum Lionellum innuendo) is at home he (ipsum Lionellum iterum innuendo) goes to Church, but when he (ipsum Lionellum iterum innuendo) is at London, he (ipsum Lionellum iterum innuendo) goes to Mass: (Missam in Ecclesia Romana performat innuendo) Sir John Cotton (quendam Johan' Cotton de Stratton in Com' Bedf. Baronet' al' Burgens' five Membr' Villæ de Hunt' prædict' in Parlamento prædict' innuendo) and he (ipsum Lionellum iterum innuendo) were both Pensioners (ipm Johan' Cotton & Lionellum pençones habere de prædict' nuper Rege Carolo secundo ad consentiend' & voces suas dand' in Parlamento pro conseccone legum & statut' in oppres- sione subdit' ipsius nuper Regis innuendo) all the time of the Long Parliament (prædict' Parliament' in quo idem Lionellus & prædict' Johannes ut præfertur fuerint Burgens' five Membr' innuendo) prædictusque Johan' ex ulteriori malitia sua postea scilicet eisdem die & anno ult' menconat' apud Hunt' prædict' super quod' al' Colloquium adtunc & ibidem habit' eum prædict' Thoma Waddington adtunc & ibidem Servien' ipsius Lionelli existen' de & concernen' eodem Lionello & Religione ipsius Lionelli & de suo existen' un' Burgens' five Membr' Parliamenti prædict' pro Villa de Hunt' præd' in præsentia & auditu quamplurimarum aliarum person' in publico & aperto Mercato ibidem assemblat' existen' ad intencon' prædict' hæc alia falsa ficta scandalosa Anglicana verba sequen' (præd Thoma Waddington adtunc & ibidem Servien' ipsius Lionelli ut præfertur existen') de eodem Lionello falso & malitiose palam & publice dixit retulit asseruit & alta voce publicavit & pronuncavit (videlicet) Your Master (ipsum Lionellum ejus Servien' præd' Thom' ut præfertur tunc fuit innuendo) is a Papist; when he (ipsum Lionellum iterum innuendo) is in the Country he (ipsum Lionellum iterum innuendo) goes to Church, but when he (ipsum Lionellum iterum innuendo) is at London he (ipsum Lionellum iterum innuendo) goes to Mass, (ipsum Lionellum ad audiend' Missam in Ecclesia Romana performat' ivisse innuendo) Sir John Cotton (prædict' Johan' Cotton iterum innuendo) and he (ipsum Lionellum iterum innuendo) were both Pensioners all the time of the Long Par- liament. Quorum quidem falsorum fictorum scandalosorum & malitiosorum verborum diccon' & propalæon' prætextu idem Lionellus

nellus non solum in bonis nomine reputacone & fama suis prædict' gravit' læsus & deteriorat' est verum etiam diversas grandes denar' sum' pro sedacone quamplurimorum falsorum rumorum de ipso Lionello sparfor' expendere & diversos corporis sui labores subire coact' & compulsus fuit ad dampnum ipsius Lionelli ducent' libr' & inde producit' sectam &c.

Et prædict' Johannes p Richardum Lee Attorn' suum ven' & defend' vim & injur' quando &c. Et dic' quod ipse in nullo est culpabilis de præmissis superius ei imposit' modo & forma prout prædict' Lionellus superius versus eum queritur & de hoc pon' se super patriam & prædict' Lionellus similiter Ideo Præcept' est Vic' quod Venire fac' hic à die Sanctæ Trinitatis in tres Septiman' duodecim &c. per quos &c. Et qui nec &c. ad recogn' &c. quia tam &c.

The Defendant
pleads Not
guilty.

Sir Lionell Walden versus Mitchell.

The Plaintiff Declared in an Action for Words, That he was a true professer of the Protestant Religion according to the Reformation and Laws of England, and that he had been a Member of the Parliament, begun the 8th of May, 13 Car. 2. and that the Defendant premissor' non ignarus 8 Decemb. Anno Domini 1688. having discourse of the Religion of the said Plaintiff, and of his having served in the said Parliament, said to T. W. Servant of the Plaintiff, your Master is a Papist, when he is at Home he goes to Church, but when he is at London he goes to Mass; Sir John Cotton and he were both Pensioners (innuendo, that the said Sir John Cotton and the Plaintiff received Peasions of King Charles the Second; for giving their Votes in Parliament for Laws and Statutes in oppression of the People) at the time of the long Parliament innuendo, the Parliament in which the Plaintiff and Sir John Cotton served, and upon not Guilty pleaded, a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that none of these words were Actionable; 1 Leon. 336. To call a Man Papist; said by Wray Chief Justice there, that it is not Actionable unless spoken of a Bishop, so in Savage and Cooks Case, 1 Cro. 192.

It is true, where spoken of a Person in some eminent Office otherwise; as Sir John Knightlies Case, who was a Justice of Peace, and Deputy Lieutenant, Hill. 33 & 34. Car. 2. in C. B. rot. 1518. He had Judgment in an Action for calling of him Papist, and it was affirmed in a Writ of Error brought in B.R. And the Case of Peake and Tucker, which was Trin. 1. Jac. 2. B. R. Rot. 838. Where the Plaintiff was a Merchant, And the Defendant said of him he is a Rogue, a Papist Dog, never a Rogue in Town would have made a Bonfire, but he. (Note those words

were spoken the Day that King James came to the Crowne, and the time is supposed to have influenced the Opinion of the Court) and the Plaintiff had Judgment. After having heard the Case several times spoken to, the Court gave Judgment for the Plaintiff principally for the words, that he went to Mass; for by the Statute of 23 Eliz. cap. 4. the Offender is to forfeit 100 l. and be imprisoned for a year, so that they expose him to Corporal Punishment. It is held, that to say a Man committed petit Larceny is Actionable, Allens Rep. 11.

The Chief Justice here said, That where a Man had been in an Office of Trust, to say that he behaved himself corruptly in it, as it imported great Scandal, so it might prevent his coming in to that or the like Office again, and therefore was Actionable.

Note, The time these words were spoken was taken notice of (viz.) between King James the Second's Desertion of the Kingdom, and the Proclaiming of the King and Queen, when to call a Man Papist would have exposed to him the danger of the Rabbie, whereupon Judicium pro Quer.

Lade versus Parker.

Vide ante Termino Michal' ult. It was this Term moved again, That the pleading dedit & concess' Nicholao Marsh, filio suo Annuitatem præd' habend' præd' Nicholao hereditibus & assignat' suis ad opus & usum dicti Nicholai hæred' & assign' suor' per quod & vigore Statuti de usibus in possession' transferen', the said Nicholas became seised, &c. was sufficient, and the words quæ quidem concessio, &c. quod vide ante were to be rejected as Surplusage: And of that Opinion were Powell, Rokeby and Ventris.

But Pollexfen Chief Justice held strongly to the contrary; and he agreed, this Deed being to the Son with an express Consideration of natural affection, (the Money was also part of the Consideration mentioned) that it would work as a Covenant to stand seised: But then the Parties ought to have pleaded it as a Covenant, to stand seised, according to the legal construction of such a Deed where there is no Execution at Law; whereas, here they have pleaded it as a Grant at the Common-Law.

The other Judges differing in their Opinion said, It was sufficient to plead the Deed as it was worded, and if there were sufficient matter to intitle the Avowant, Judgment ought to be given accordingly; and then the Avowant concludes, that he became seised by the Statute of Uses, which Deed he intended to take the operation of the Deed that way, so Judgment was given for the Avowant. Chief Justice contra.

Note,

Note, Serjeant Levins cited the Pleading in Foxes Case, 8 Co. where the words Demise and Grant in consideration of Money amounted to a Bargain and Sale, (it being of an Estate for years) without enrolment) it was pleaded, *Similis concessit & ad firmam tradidit, & non Barganizavit.*

Woodward, &c. *versus* Fox.

IN an Action sur Assumpsit for 200 l. received to his use. Upon non Assumpsit a Special Verdict was found, quod vide ante Term Trin' ult. and the Case this Term came to have the resolution of the Court: The case upon the Special Verdict is to this effect, an Arch-deacon maketh a Register of the Court, belonging to his Arch-deaconry in Consideration of 100 l. The Bishop of the Diocess, who was also Patron to the Archdeacon (supposing the Office to have been void, by the Statute of 5 and 6 Edw. 6. against the Sale of Offices relating to the Administration of Justice) granted the said Office of Register to the Defendant, and the said Grant was confirmed by the Dean and Chapter; The Archdeacon after the Death of that person to whom he had sold the Office, ut supra, Grants the said Office to the three Plaintiffs for their Lives, and the Life of the longer liver of them, the Plaintiffs before any Office found for the King, or any Record shewing the Sale of this Office, obtains a Grant of it from the now King and Queen.

The Court were all of Opinion for the Plaintiffs.

The Court did not speak to two Points stirred in the case, (viz.) Whether this Office could be granted for three Lives, or whether it was within the said Statute of 5 and 6 Edw. 6. because they were in a manner agreed at the Bar and the Points settled, But the two main Points in the Case which were spoken to are,

First, Whether an Archdeacon sells the Office of Register in the Court of the Archdeaconry, whether by the Statute of 5 and 6 Edw. 6. the Grant and Nomination to this Office shall come to be Crown, or whether it shall go to the Bishop of the Diocess.

Secondly, Admitting the Right to be in the Crown, whether the King and Queen can make a Register this Office found, or that the Title appears by some matter of Record.

1. It was resolved, that the Right of appointing the Register, it being forfeited by the said Statute of 5 and 6 Edw. 6. did come to the King and Queen.

It is a Rule laid down by Manwood Chief B. Mo. 238. That where a Statute giveth a forfeiture either for Nonfeasance or Misfeasance, the King shall have it so in 11 Co. 68. This follows the Reason of the Common Law, in case of things which are nul-

lius in bonis; where no visible Right appears, the Law giveth them to the King (Siderfin 148, 86.) As Derelict Land, Treasure Trove, and a great number of such like instances may be cited from the Books; so it is in Extraparochial Tithes, tho' things of an Ecclesiastical nature, 2 Inst. 646. Cawdry's Case, 5 Co. 18. Nay, if the Right lie equal between the King and Subject, the Kings Title hath the preference by Law; Detur digniori is a Rule, 9 Co. 14. In case of concurrence of Titles, between the King and Subject.

It was objected, That this held in valuable things, and matters of profit to the Crown:

But the Court said, there was no such distinction made in the Books, and many Privileges, &c. were given to the King, for the publick good and interest of the Government, as well as for encrease of the King's Treasure. There is no exception out of this construction of Forfeitures upon Penal Statutes, unless they are in recompence for the Damage suffered by a Subject, as the Statute of 2 Ed. 6. that giveth the Forfeiture of the treble value for not setting out of Tithes, 2 Inst. 650. And this follows the Reason of the Common Law, that Fines and Penalties for Offences at Law go to the King as the Head of the Government; and that was the second Reason the Court went upon, that the Offence for which this Forfeiture is inflicted is principally against the King. By the preamble of the Statute it appears to be made for avoiding of corruption in Offices, and abuses in the Administration of Justice.

Now the King is the Fountain of Justice, and that Ecclesiastical as well as Civil, in the case of Proxies Davis Rep. 4. It is said the King has power, and that by the Ancient Law of the Realm, to Visit, Reform and correct all Abuses, and Enormities in the Jurisdiction Spiritual; so that an Offence of this nature is a Violation of the Kings Justice, and a Transgression of the Rules of his Administration.

This is indeed the case of all Crimes of a publick nature, the King is most evidently injured by them; the Indictments run contra coronam & dignitatem, &c. Now, who should have the Forfeiture, but he that hath the greatest share in the Injury?

Again, by giving of this Forfeiture to the King, the end and design of the Statute is like to be best answered. By the Preamble the Statute appeareth to be made, that worthy persons might be advanced to places where Justice was to be administered; and who is best to be entrusted with this but the King?

The Court having given these Reasons, they came to consider what had been insisted on, at the Bar in the behalf of the Bishop: It was said, that all the Jurisdiction Ecclesiastical in the Diocels, was originally placed in the Bishop, and the case of Gastrill and Jones, 2 Ro. Rep. 646, 647. was cited where it is said, That the Judicial

Judicial power of the Archdeacon was derived from the Bishop; he is called Vicarius Episcopi, and Oculus Episcopi.

'Tis true, there are some Archdeacons that have Jurisdictions peculiar and exempt; but that is by Prescription or Custom; these are taken notice of by Godolphin.

But there is nothing sound of that in the Verdict, and so must be taken to be the common case of an Archdeacon, and that was agreed.

It was said, this offence was reckoned Simony in the Canon Law. And the Bishop had the correction of it, as in *Smithes Case*, Owens Rep. 87.

This was compared to the Cases of Inferiour and subordinate Officers; which when they are forfeited, the superiour takes advantage, as in the *Earl of Pembrooks Case*, and *Sir H. Bickly, Popham 119*. The Keeper of a Walke in a Forest forfeited, this went to him that had the custody of the Forest; so in *Bridgman's Rep. 27*. He that hath Liberty of a Park in a Forest, when forfeited it goeth to the Lord of the Forest, 39 H. 6. 32. The Keeper of the Marshalsey of the Kings Bench forfeited his Office, the Duke of Norfolk Great Marshal of England took advantage of it.

To these Cases it was said by the Court, That they differed much from the Case at the Bar.

First, In the Cases cited, the Inferiour Officer is put in by the Superiour, and in some Cases to answer for his miscarriage ubi respondeat Superior, they are Offices incident, as the County Clark to the Sheriff, *Mittons Case*, 4 Co. and *Scroggs Case*, of the Exigenter to the Chief Justice of the Common Pleas, *Dyer 175*. But here the Bishop doth not put in the Register of the Archdeacons Court: He may make one to supply that place if it falls void; when the Archdeaconry is vacant, but then the next Archdeacon removeth him and puts in another.

Secondly, The Forfeitures in the Cases cited were upon Breaches of Conditions in Law annexed to the Offices; and tis a Rule in Law, that the Grantor is to take advantage of the Breach of all Conditions; but we are in case of a Forfeiture, for offending against an Act of Parliament: And the Court said, tho' it might be supposed originally, the Jurisdiction within the Diocess was lodged in the Bishop; yet the Archdeacons Court hath long out of mind been settled as a distinct Court, 4 Inst. 339. and the Statute of 24 H. 8. cap. 12. takes notice of the Consistory Court, which is the Bishops Court, and the Archdeacons Court from which there lies an Appeal to the Bishops Court, in 2 Ro. Rep. 150. *Chivertons Case*, The Archdeacon is said to have a Court of himself, and that the Courts of Westminster take notice thereof: To s may be resembled to the Case of the Torn and Lect in the County; the Lect is supposed to have been derived out of the Torn,

and

and yet upon the Forfeiture of a Leet, it shall not go to the Sheriff.

As to the second Point it was resolved by the Court, That the King might in this Case make a Register before Office found. It was agreed, That where an Estate of Freehold was forfeited to the King by Act of Parliament, that an Office would be requisite to vest it in the King, and that by the Statute of 5 Edw. 6. against the sale of Offices, all the Estate and Interest, &c. of the Offender is forfeited. But Pollexfen Chief Justice conceived, this was not an Estate in the Archdeacon, but only a Power to appoint a Register, and in the nature of a chose en Action, like the case of Offices in the King, where the King may grant or nominate to the Office, but hath not the Office in him to use or execute. But he conceived, and with that the rest of the Court agreed, that however as to the present vacancy the right to supply that was a Chattel separate from the Inheritance, and the King might supply the present avoidance before any Office found, tho' it be admitted, that the right of nomination in point of Estate should not vest in the King before Office found. Where the Kings Tenant dies seised of an Advowson, or in case of an Outlawry, tho' the Estate is not in the King before Office: yet if the Church becomes void, the King shall present before Office, 20 Edw. 4. 11. The case so put of an Advowson appendant; *Stranf. Prerog.* 54. B. This is a Transitory Chattel, the present avoidance, *Lanes Rep.* 43. 64. 1 Ro. Rep. 326. and *Jones Rep.* 425. So the Body of the Ward is in the King before Office. In Case of Simony the King shall present without Office, (Sed nota 31 Eliz. giveth the Presentation pro hac vice only :) And the Court said, that the Verdict found, that the Plaintiffs had a Grant from the Archdeacon also; so that if nothing be in the King till Office, it must remain in the Archdeacon, so his Grant will be good till Office found: There are no disabling words in the Statute, but only shall Lose and Forfeite, so quacunq; via data, the Plaintiffs ought to have Judgment.

Harris versus Parker. Ante ult^o Term.

IN an Action of Debt for 99 l. Rent, the Plaintiff Declared upon two Demises, w^{ch} he said at the Parish of St. Martin in the Fields in Middlesex of a Messuage, and divers Lands quæ præmissa sunt situat^r jacent^r & existent in & super acoliviratem de *Hampstead* (Anglicè) the tith of *Hampstead Hill*, to hold for seven years, reserving upon each Demise eighteen pounds yearly Rent.

The Defendant pleaded, *Actio non, quia dicit quod præd^r Johannes Harris, tempore dismis^r præd^r nihil habuit in Tenementis prædict^r unde, &c.*

The

The Plaintiff Replied, That long before the said several Demises, (viz.) 13 Novemb. Anno 26. Car. 1. super Regis, The Lord Wotton Demised the Premises in Hampstead præd' to the Plaintiff for 40 years, (the said Lord Wotton, adunc & ibidem plenam potestatem jus & titulum ad præmissa dimittend' pro præd' Termino Quadraginta & unius annorum habente) by virtue whereof the Plaintiff entred and became possessed, and made the several Demises to the Defendant, &c. prout, &c.

To this the Defendant Demurred:

And it was objected, That the Replication was insufficient; for that it did not set forth what Estate the Lord Wotton had when he made the Demise to the Plaintiff, but only plenam Potestatem jus & titulum adunc habente; whereas it should have been shewn that he was seised in Fee, or of some other Estate, empowering him to make the Lease, Yelv. 228. Glasses Case; where in Debt for Rent, The Defendant pleaded, The Plaintiff nil habuit, as in this Case, and the Plaintiff replied, quod habuit bonum & sufficientem Statum unde he could Demise, and Issue thereupon, and a Verdict for the Plaintiff: And upon a Writ of Error brought the Court held, That the Estate ought to be set forth, that the Court might judge whether the Plaintiff could make the Lease; but it being after a Verdict, in that Case they resolved, it was aided by the Statute of Jeofails: And the Court inclined in the Case at Bar, that it was not good upon a Demurrer.

But then an Exception was taken to the Bar, that it was tempore dimissionum prædictar' nil habuit; whereas there are two Demises in the Declaration, and the Plaintiff might have a Title, the time when one was made and not the other, and tempore in the singular number can be understood but of one of the Demises.

But the Court said, tempore would serve as well as temporibus, and non Assumpsit where there are divers Promises; or in a Quo Warranto he used several Franchises, and the Party Entitles himself in his Plea to one by Prescription, and to another by Charter, &c. he may conclude & eo War' clamar, &c. Palmers Rep. 1, 2. Nevertheless it was resolved, That the Bar was insufficient, for he ought to have pleaded distinctly, (viz.) That the Plaintiff nil habuit at the time of the first Demise, nor at the time of the second; for as tis pleaded the Constitution is dubious and incertain, whether he had Right when each of the Demises was made, or at either of them, and the Council for the Defendant sitting the Opinion of the Court, took exceptions to the Declaration.

For that no place is laid for the Messuage and demised Premises, only tis said quæ premissa sunt situat' & existent' in & super acclivitatem de Hampstead (Anglicè) the rise of Hampstead Hill, and this could not be taken for a Vill, or lieu conus out of a Vill; a Venire may come out of a Forest, &c. or place known, but then it must be shewn to lie out of a Town or Parish, 1 Inst. 125. Syderfin 326. Hutton 105.

Pollexfen Chief Justice was strong of Opinion, That here was no place sufficiently laid for the Lands, as to the manner of laying it: It seemed to be only a description of their Situation. He seemed to agree, that to lay a thing apud acclivitatem de Hampstead might be good, but to say Situat' in & super, &c. varied wholly from the form of pleading the place.

The other three Justices agreed, That the place was sufficiently laid, they did not take acclivitas de Hampstead in this Case. for a lieu conus, for that must indeed lie out of any Town or Parish; but here the Venue shall come out of Hampstead, and Hampstead shall be taken for the Vill, and they relied upon the Cases, 1 Ro. Rep. 312. Atkinson and Buckle, where a delivery of Goods was alleged to be at Barton Haven, and not shewn where Barton Haven was; there it was inteneded, Barton was a Town, and the Haven there, so the Venire was out of Barton, Mo. 695. Issue upon delivery of Goods apud Portum de Blackney, the Venire was to Blackney, 2 Cro. 239. so Hampstead is taken for the Town.

And as to the form of Pleading, it seemed to the said Justices not to be varying in sense from the common form, and that in & super might serve as well as apud; so by their three Opinions, Judgment was given for the Plaintiffs.

Target versus Loyd.

Covenant.

Indentures made.

Midd'x. **E**LIZABETHA LLOYD nuper de parochi Sancti Jacobi Westm' in Com' prædict' Vid' alias dicta Elizabeth Loyd of the Parish of St. James Westminster in the County of Middlesex, Widow; sum' fuit ad respondend' Willemo Target Bricklayer de placito quod teneat ei Convenconem inter prædict' Elizabetham & ipsum Willielmum secundum vim formam & effectum quarundam Indenturarum inter prædict' Elizabetham & præfar' Willielmum factarum Et unde idem Willielmus per Willielm' Botteler Attorn' suum dic' quod cum per quandam Indenturam apud parochiam Sanctæ Margaret' Westm' in Com' prædict' factam decimo sexto die Novembris anno regni domini Jacobi secundi nuper Regis Angl' &c. quarto inter præfar' Elizabetham per nomen Elizabethæ Loyd de parochia Sancti Jacobi Westm' in Com' Midd' Vid' ex una parte & prædict' Willielm' per nomen Willielmi Target de

de eadem parochia & Comitat' Bitchlaper ex altera parte & menconat' fore factam inter præfat' Elizabetham Loyd per nomen Elizabeth' Loyd de parochia Sancti Jacobi Westm' in Com' Midd' **Widow** ex una parte & prædict' Willielm' Target per nomen Willielmi Target de eisdem parochia & Com' Bitchlaper ex altera parte Cujus quidem Indenturæ alteram partem sigillo præd' Elizabethæ sigillat' dictus Willielmus hic in Cur' profert cujus dat' est eisdem die & anno Testatur quod prædict' Elizabetha p & in consideracone annual' reddit' & convencon' in eadem Indentura reservat' & content' & diversis aliis bonis causis & consideraconibus ipsam dictam Elizabetham adinde moven' dimississet concessisset & ad firmam tradidisset &c. per eandem Indenturam dimisit concessit & ad firmam tradidit eidem Willielmo Executoribus Administratoribus & Assign' suis illa duo mesuagia vel tenementa & parvas areas à Fronte cum sub-
Profert in Curia.
 liciis inclus' situat' jacen' & existen' in **Market Lane** in parochia & Com' præd' & tunc in occupacone ejusdem Willielmi abutran' super viculam (vocat' **Market Lane**) ex occidentali in mesuagium vel tenementum in occupacone Willielmi Eades ex Meridionali in parv' ingressum & passagium à viculo (vocat' **Market Lane**) prædict' ex boreali & in aream mesuagij in occupacone Mariæ Tomlin ex Orientali una cum omnibus viis passagiis luminibus p'ficiis casiamen-
The Demise.
 tis commoditatibus & appertinen' qualitercunque dictis mesuagiis sive tenementis & præmissis spectan' vel in aliquo modo appertinen' seu cum eisdem tunc usis occupat' vel gavis' Habend' & tenend' dict' mesuagia sive tenementa & omnia alia singula alia præmissa præ-
Habendum.
 dimissa cum pertinen' dicto Willielmo Target Executoribus Administra- toribus & Assign' suis à Festo die Annunciaconis Beatæ Virginis Mariæ tunc prox' sequen' datuma dictæ Indenturæ usque plenum finem & terminum viginti & quinque anhorum abinde prox' sequen' & plenarie complend' & finiend' Reddend' inde & solvend' annuatim duran' prædict' termino eidem Elizabethæ Loyd Executoribus Ad-
Reddendum.
 ministratoribus & Assign' suis summam sive annual' Reddit' viginti & quatuor librarum legalis monetæ Angl' ad quatuor maxima usualia Festa sive Terminos in anno (videlicet) Festum Nativitatis Sancti Johannis Baptistæ Sancti Michaelis Archi' Nativitatis Domini nostri Dei & Annunciaconis Beatæ Mariæ Virginis per æquas & æquales porcones Et idem Willielmus Target dic' quod ipse prædict' Williel-
The Covenants
 mus Target pro seipso Executoribus & Assign' suis convenit p'misit & concessit ad & cum eadem Elizabetha Executoribus Administra- toribus & Assign' suis per eandem Indenturam modo & forma (videlicet) quod ipse idem Willielmus Executores Administratores & Assign' sui infra tres annos prox' sequen' dat' dictæ Indenturæ ad ejus & eorum propr' onera & custagia fabricarent & facerent vel fabricari & facere caularent supradicta singula mesuagia sive tenementa in duas duplices domus sufficien' (Anglicè double sufficient Houses)

The Plaintiff
entred and
was posselt.

And erected
New Houses,
according to
his Covenant.
The Plaintiff
avers perfor-
mance of all
on his part.

The Breach
assigned.

Demise to J. S.
for part of the
Term.

J. S. entred.

duas Romeas in aream continen' Acetiam ad ejus & eorum prope onera & custagia repararent passagium dictis dimissis præmissis pertinen' Et (sicut tunc fuit latitudinis trium pedum) latitudinis trium pedum & dimidij unius pedis in Clera (Anglicè the Clere) facerent (ostio ad dom' passagium except') Et idem Willielmus ulterius dic' quod prædicta Elizabetha per eandem Indenturam pro seipsa Executoribus Administratoribus & Assign' suis convenit promisit & concessit ad & cum dicto Willielmo Target Executoribus Administratoribus & Assign' suis modo & forma sequen' (videlicet) quod ipsa dicta Elizabetha Executors Administratores & Assign' sui permitterent & tollerent dom' Willelm' Executors Administratores & Assign' sui ad ejus vel eorum prope onera & custag' facere aqueductile (Anglicè a Drayn) ad aquam vacuum (Anglicè Waste Water) à dictis domibus in magnam Canalem Fossam (Anglicè Main Shoat in Str Bell-yard) abducend' prout per eandem Indenturam inter alia plenius liquet & apparet Virtute cujus quidem dimissionis idem Willielmus immediate post Festum Annunciacionis Beatæ Mariæ prox' sequen' datum dictæ Indenturæ in tenementa præd' cum pertin' intravit & fuit inde possessionat' Ipsoque Willielmo sic inde possessionat' idem Willielmus de novo ædificavit erexit & fecit supradicta singula mesuagia sive tenementa cum pertin' in & per omnia secundam formam & effectum Indenturæ præd' Et idem Willielmus ulterius dicit quod licet ipse præd' Willielm' omnes & singula convencones concessiones & agreamenta in Indentura prædicta superius specificat' ex parte ipsius Willielmi Executor' Administrator' & Assignator' suorum performand' & perimplend' bene & fidelit' juxta vim formam & effectum Indenturæ prædictæ custodivit & perimplevit prædicta tamen Elizabetha convenconem præd' inter ipsam Elizabetham & præfat' Willielm' factam (Et quod ipsa eadem Elizabetha existens possessionat' de termino viginti annorum & ultra adhuc ventur' & inexpirat' de & in quadam pecia terræ ac de & in diversis stabulis scituat' jacen' & existen' in parochia sancti Jacobi Westm' in Com' prædict' inter præd' domos per prædict' Willielm' modo & forma supradicta ædificat' & prædict' Canalem Fossam (Anglicè Main Shoat in Str Bell-yard) prædicta & per quæ aqueductal' præd' currere debuit à prædict' domibus in Canalem Fossam prædict' apud parochiam Sancti Jacobi Westm' prædict' in Com' prædict' concessit dimisit & assignavit prædict' peciam terræ & stabula prædict' cuidam Johanni Tomlinson Executoribus Administratoribus & Assign' suis pro diversis annis adtunc & adhuc ventur' parcel' termini Virtute cujus quidem concessionis dimissionis & assignaconis idem Johannes Tomlinson in vita sua postea in prædict' peciam terræ & stabul' prædict' intravit & fuit inde possessionat' Et sic inde possessionat' existen' idem Johannes postea scilicet primo die Julij Anno Domini millesimo sexcentesimo octogesimo octavo apud

apud parochiam Sancti Jacobi Westm' in Com' prædict' de præmissis prædict' sic ut præfertur possessionat' obiit intestat' post ejus quidem And died posselt. Johannis mortem scilicet nono die Julij Anno Domini millesimo sexcentesimo octogesimo octavo Administraco omnium & singulorum bonorum & catallorum Jur' & Creditor' quæ fuerunt præd' Johannis tempore mortis suæ per Johannem Edisbury legum Doctorem Reverend' Vir' Decani & Capituli Ecclesiæ Collegiat' Divi Petri Westm' loci illius Ordinari' Commissari' & Officialem legitime constitut' apud parochiam Sanctæ Margarete Westm' præd' in Com' præd' cuidam Mariæ Tomlinson nuper uxori præd' Johannis debita legis forma commissa fuit per quod præd' Maria postea scilicet die & anno ult' Administration of his Goods granted to his Widow. mentionat' in prædict' peciam terræ & stabula præd' intravit & fuit inde possessionat' Virtute Concessionis & Administraconis prædict' Ipsaque Maria sic inde possessionat' existens postea scilicet primo die Septembris Anno Domini millesimo sexcentesimo octogesimo octavo supradicto apud parochiam præd' in Com' prædict' cepit in virum quendam Samuelem Carter per quod iidem Samuel & Maria in prædict' peciam terræ & stabula præd' intraverunt & fuerunt inde possessionat' Ipsique Samuel & Maria sic inde possessionat' existens prædict' Samuel & Maria dicit' Willielm' ad ejus propr' onera & custagia facere Aquaductale (Anglicè a Drayn) ad Aquam vacuum (Anglicè the waste Water) à suis Domibus in forma præd' ædificat' & fact' per prædict' peciam terræ & stabula prædict' in magnam Canalem (Anglicè Main Shoar in Str Bell-yard) præd' abducend' juxta vim formam & effectum Indenturæ præd' non permiserunt sed prædict' Willielm' facere Aquaductale (Anglicè a Drayn) ad Aquam vacuum (Anglicè waste Water) in dictis domibus per præd. peciam terræ & stabula prædict' in magnam Canalem (Anglicè Main Shoar in Str Bell-yard) prædict' abducend' recusaverunt & adhuc recusant licet ad ill' permittend' iidem Samuel & Maria per eundem Willielm' Target postea scilicet primo die Augusti Anno Domini millesimo sexcentesimo octogesimo nono apud parochiam Sancti Jacobi præd' in Com' prædict' requisit' fuerunt non tenuit set infregit & ill' p'fat' Willielmo hucusque tenere omnino contradixit & adhuc contradic' Unde dic' quod deteriorat' est & dampnum habet ad valenciam Centum librarum Et inde produc' sectam &c.

Et prædict' Elizabetha per Johannem Tissar Attorn' suum venit & defendit vim & injur' quando &c. Et dic' quod prædict' Willielm' Target acconem suam prædict' versus eum habere non debet Quia dic' quod prædict' passagium dictis præmissis præfat' Willielmo dimissis pertinet scituat' in prædict' parochia Sancti Jacobi Westm' prædict' & ducit à prædict' dom' præfat' VWillielmo ut præfertur dimiss' usque ad Str Bell-yard præd' in prædict' parochia Sancti Jacobi VWestm' quodque quoddam Aquaductale (Anglicè a Drayn)

The Defendant pleads, That he permitted the Plaintiff to make a Drayn, according to his Covenant.

That he permitted and gave liberty.

But the Plaintiff refused it.

The Plaintiff Demurs.

The Defendant joins in Demurrer.

ad Aquam vacuam (Anglice the waste water) à dictis dom' in prædict' magnam Castalem fossam (Anglice Main Ditch in the Bell-yard) prædict' abducend' in & per passagium prædict' convenient' fieri potuit & potest quodque ipsa eadem Elizabetha post concessionem dimissionis prædict' præfat' Willielmo ut præfertur factæ scilicet prædict' decimo sexto die Novembris anno regni dicti nuper Regis Jacobi quarto supradicto apud parochiam Sanctæ Margarete VVestm' prædict' permisit & libertatem dedit præfat' VVillielm' ad ejus onera & custagia facere Aquaductale in & per passagium prædict' ad Aquam vacuam à dictis dom' in prædict' magnam Castalem Fossam in the Bell-yard prædict' abducend' per quod idem VVillielmus aquaductale ill' in & per passagium prædict' ad libitum suum facere potuisset si voluisset set hoc facere penitus recusavit. Et hoc parat' est verificare unde petit Judicium si prædict' VVillielmus actionem suam prædict' versus eam habere debeat &c.

Et prædictus VVillielmus dicit quod prædict' placitum prædict' Elizabeth' superius in Barram placitat' ac materia in eodem content' minus sufficien' in lege existunt ad ipsum VVillielmum ab actione sua prædict' versus præfat' Elizabetham habend' præcludend' quodque ipse ad placitum illud modo & forma prædictis placitat' necesse non habet nec per legem terræ tenetur respondere. Et hoc parat' est verificare. Unde pro defectu sufficien' respons' prædict' Elizabethæ in hac parte placitat' idem VVillielmus per Judicium & dampna sua occon' fraccon' convenconis prædict' sibi adjudicari &c.

Et prædict' Elizabetha (ex quo ipse sufficien' materiam in lege ad prædict' VVillielm' ab actione sua prædict' versus ipsam Elizabetham habend' præcludend' superius allegavit quam ipsa parat' est verificare. Quam quidem materiam prædict' VVillielmus non dedicit nec ad eam aliquant' respondit sed verificacon' ill' admittere omnino recusavit) per Judicium. Et quod prædict' VVillielmus ab actione sua prædict' versus eam habend' præcludatur &c. Et quia Cur' dicti domini Regis & dominæ Reginæ hic de Judicio suo de & super præmissis reddend' nondum advisatur dies inde dat' est partibus prædictis hic usque—de audiendo inde Judicio suo eo quod Justic' hic inde nondum &c.

Target

Target *versus* Loyd.

In an Action of Covenant, the Plaintiff Declared, That by Indenture made at Saint Margarets in Westminster between the Defendant, by the name of Elizabeth Loyd, of the Parish of Saint Margarets Westminster, &c. and the Plaintiff, &c. Testatur, That the Plaintiff had demised to the Defendant all those two Messuages, &c. lying, and being in Market-Lane, in the Parish and County aforesaid, with all Ways, Passages, &c. to hold for one and twelvemonth, reserving 24 l. yearly Rent, and the Plaintiff set forth the Covenants in the Indenture to be performed on his part, (viz.) That he should repair and enlarge the Passage belonging to the Premises, &c. and then sets forth, that the Defendant by the said Indenture for her self, her Executors, Administrators and Assigns, did Covenant with the Plaintiff; that she, her Executors, Administrators and Assigns, would permit the Plaintiff at his proper Costs to make a Drain, to convey the waste Water from the said Houses demised as aforesaid, to the main Shore in Six Bell Yard, prout per Indentur' p'd' plen' liquet, and then shewed that he entered and became possessed by virtue of the said Demise, and that the Defendant had broke the said Covenant (eo quod,) that she being possessed of a Term for years, then and yet to come of a certain parcel of Land, and two Stables lying between the demised Premises, and the said main Shore in Six Bell Yard; and by which the Drain aforesaid, ought to run from the said Houses into the main Shore aforesaid; and then sets forth, that the Defendant had assigned all her Term in the said piece of Ground, and Stables to one Tomlinson, by virtue whereof he entered, and after died possessed of the said piece of Ground and Stables; and that Mary his Wife afterwards became possessed thereof as his Administratrix, and did after Intermarry with one Barker, who became likewise possessed, and the said Barker and his Wife non permiserunt, the Plaintiff to make a Drain, to carry the waste Water from the Houses demised as aforesaid to the Plaintiff, thorough the said piece of Ground and Stables (assigned as aforesaid) into the said main Shore; but did refuse, and do yet refuse the Plaintiff to make the same, tho' requested thereunto, such a day and year, &c. so the Defendant had broken her Covenant ad damnum Cent' librarum.

The Defendant pleaded, That the aforesaid Passage belonging to the said demised Premises, is Situate in the Parish of Saint James aforesaid, and leads from the Houses demised to the Plaintiff as aforesaid, to Six Bell Yard aforesaid, and that a Drain to carry off the waste Water from the said Houses, to the said main Shore in Six Bell Yard, in and thorough the said Passage might have been;

and

and still may be conveniently made; and that the Defendant did permit the Plaintiff to make a Drain in and thorough the said Passage, for the carrying off, &c. and if the Plaintiff would, he might have made it accordingly, but he refused to do it, and demands Judgment of the Action.

To this the Plaintiff Demurred. And it was Argued at the Bar, that this Plea was insufficient; for when the Defendant Covenanted, that the Plaintiff should be permitted to make a Drain from the demised Premises to Six-Bell Yard, he was at election to make it through any part of the Defendants Ground that lay between, tho' the Ground were built upon, and so might be very inconvenient for the Defendant, and tho' there might be another place to make the Drain in. And cited the Cases of Election; as where a Feoffment is made of 20 Acres of such a Wood, &c. the Feoffee may take which 20 he will in any part of the Wood.

The Court were rather inclined, that in this Covenant there should not be Election to make the Drain through the parties Stables, or Buildings, in case there were other places proper and convenient to make the Drain in; for every Agreement must have some reasonable Construction that may be consistent with the Intent of the parties. But no Opinion was delivered as to this Point, because there were divers Exceptions taken to the Declaration, some of which were fatal.

First, There is no certain place laid for the Houses demised, which are said to be lying and being in the Parish aforesaid; where, as there are two named before, (viz.) St. Margarets and St. James's, so it was altogether uncertain.

Secondly, The Breach is eo quod, they did not permit the Defendant; which is no positive Affirmation.

Thirdly, The Covenant is, That the Defendant, her Executors, Administrators and Assigns shall permit, and the Breach is laid in the Assignees not permitting; and it appears by the pleading, that this Assignment was made to Thomlinson divers years before the Demise to the Plaintiff; and this Covenant cannot be extended only to the Assignees of the Defendant after the Demise made.

Fourthly, Here 'tis said quod non permisserunt; but no special Disturbance, which ought to have been particularly set forth for the Court to judge of it.

The Court held all these Exceptions, but the second, to be fatal, especially for that the Disturbance was laid to be by an Assignee which came in before the Demise; but as to the pleading the Breach eo quod, they rather inclined that it was good. And so the Opinion of the Court seemeth to be in Cutlers and Southern's Case in the 1 Sand. 116. But for the other Exceptions, Judgment was given against the Plaintiff.

Priscilla

Priscella VVeb *versus* Moore.

Willel'm. FRANCISCUS MOORE nuper de paroch' de Wootton Bassett in Com' prædict' Armig' Attach' fuit ad respondend' Priscillæ VVeb Vid' de placito Transgr' super Calum &c. Et unde eadem Priscilla per Johannem VVilkyns Atorn' suum queritur quod cum prædict' Franciscus primo die Martij anno regni domini Jacobi secundi nuper Regis Angl' secundo apud Wootton Bassett indebitat' fuisset eidem Priscillæ in summa quinquaginta solidorum legalis monet' Angliæ pro cado minori (vocat' a Runlet) Vini albi (Anglicè White-wine) & triginta & sex ampullis vitreis (Anglicè Glass Bottles) ipsius Priscillæ per ipsum Franciscum de eadem Priscella ante tempus illud emp't' habit' & recept' Et sic inde indebitat' existen' prædict' Franciscus postea scilicet eodem primo die Martij anno regni dicti nuper Regis secundo supradicto apud Wootton Bassett prædict' in consideracone inde super se assumpsit & eidem Priscillæ adtunc & ibidem fidelit' promisit quod ipse prædict' Franciscus præd' quinquaginta solidos eidem Priscillæ cum inde postea requisit' fuisset bene & fidelit' solvere & contentare vellet Cumque etiam prædict' Franciscus postea scilicet decimo die Januarij anno regni dicti nuper Regis tercio apud Wootton Bassett præd' indebitat' fuisset eidem Priscillæ in summa octo librar' similis legalis monet' Angl' tam pro esculent' poculent' vino vino forti (Anglicè Brandy) nicotiano & loco (Anglicè Fire) ipsius Priscillæ pro eodem Francisco quam pro feno & pabulo ipsius Priscillæ pro quodam equo ipsius Francisci per ipsam Priscillam ad speciales instanc' & requisiconem ipsius Francisci ad sepeal' tempora antetunc invent' & provis' Et sic inde indebitat' existen' præd' Franciscus postea scilicet eodem decimo die Januarij anno tertio supradicto apud Wootton Bassett prædict' in consideracone inde super se assumpsit præfataque Priscillæ adtunc & ibidem fidelit' promisit quod ipse prædict' Franciscus easdem octo libras eidem Priscillæ cum inde postea requisit' esset bene & fidelit' solvere & contentare vellet Cumque etiam prædictus Franciscus eodem decimo die Januarij anno regni dicti nuper Regis tertio supradicto apud Wootton Bassett prædict' in consideracone quod prædict' Priscilla (communis Hospitatrix tunc existen') ad speciales instanc' & requisiconem ipsius Francisci sæpius invenisset & providisset ad onera & custagia ipsius Priscillæ propria tam esculent' poculent' vinum vin' forte nicotian' & focum pro eodem Francisco quam fenum & pabulum pro quodam equo ipsius Francisci super se assumpsit & eidem Priscillæ adtunc & ibidem fidelit' promisit quod ipse prædict' Franciscus tant' denar' summas quant' esculent' poculent' vinum vin' forte

Indebitat' Assumpsit the Defendant pleads an Out-lawry in Bar.

Indeb' Assumpsit for a Runlet of Wine.

Another Indebitatus, as well for Meat, Drink, Wine, Brandy and Tobacco, as for Horse-meat

A quantum meruit for Meat, Drink, Wine, Brandy and Horse-meat, found and provided by the Plaintiff as an Inn-keeper.

Another Inde-
bitatus for
Goods sold.

An Infirmal
computasset.

The Plaintiff
says, That the
Defendant hath
not paid the
several Sums.

forte nicotianum focum scenum & pabulum ill' rationabil' valebant eidem Priscillæ cum inde simil' postea requisit' fuisset bene & fidelit' solvere & contentare vellet Et eadem Priscilla in facto dicit quod esculent' poculent' vinum vin' forte nicotianum focum scenum & pabulum præd' raconabil' valebant scilicet octo libras similis legalis monet' Angl'. Cumque etiam prædict' Franciscus eodem decimo die Januarij anno tertio supradicto apud Wootton Bassett prædict' indebitat' fuisset eidem Priscillæ in summa septem librar' & decem solidor' similis legalis monet' Angl' pro diversis bonis mercimoniis & merchandizis ipsius Priscillæ eidem Francisco per prædict' Priscillam ad similes speciales instanc' & requisiconem ipsius Francisci ante tempus illud vendit' & deliberat: Et sic inde indebitat' existen' prædict' Franciscus postea scilicet eodem decimo die Januarij anno tertio supradicto apud Wootton Bassett prædict' in consideracone inde super se assumpsit & eidem Priscillæ adtunc & ibidem fidelit' promisit quod ipse prædict' Franciscus easdem septem libras & decem solid' eidem Priscillæ cum inde silit' postea requisit' fuisset bene & fidelit' solvere & contentare vellet Cumque etiam prædict' Franciscus postea scilicet primo die Aprilis anno regni dicti nuper Regis quarto apud Wootton Bassett præd' computasset cum eadem Priscilla de diversis denar' summis eidem Priscillæ per præfatum Franciscum ante tempus illud debet' & adtunc insolut' existen'. Et super Compō. illo præd' Franciscus invent' fuit in arregagiis erga eandem Priscillam in summa septem librar' sex solidor' & undecim denarior' similis legalis monet' Angl'. Et sic in arregagiis præd' invent' existen' præd' Franciscus postea scilicet eodem primo die Aprilis anno quarto supradicto apud Wootton Bassett præd' in consideracone inde super se assumpsit præfatoque Priscillæ adtunc & ibidem fidelit' promisit quod ipse præd' Franciscus præd' septem libras sex solid' & undecim denar' eidem Priscillæ cum inde simil' postea requisit' fuisset bene & fidelit' solvere & contentare vellet. Prædictus tamen Franciscus sepeales promission' & assumpcon' suas præd' sic ut præfertur fact' minime curan' set machinan' & fraudulent' intenden' eandem Priscillam in hac parte callide & subdole decipere & defraudare præd' sepeales denar' summas in toto seartingen' ad triginta & tres libras sex solid' & undecim denar' seu aliquem denar' inde eidem Priscillæ (licet ad hoc fac' præd' Franciscus postea scilicet decimo die Aprilis anno quarto supradicto & sæpius postea apud Wootton Bassett præd' per eandem Priscillam requisit' fuisset) non solvit seu aliquatit' p eisdem contentavit set ill' ei hucusque solvere seu aliquatit' pro eisdem contentare omnino recusavit & adhuc recusat ad dampn' ipsius Priscillæ quadragint' librar' Et ind produc' sectam &c.

Et

Et præd' Franciscus per Humfridum VVall Attorn' suum venit & defendit vim & injur' quando &c. Et dicit quod præd' Priscilla accone suam præd' versus eum habere non debet quia dicit quod quidam Scarborough Chapman al' scilicet Termino Sanctæ Trinitatis anno regni dicti domini nuper Regis tertio implacitavit præd' Priscillam per nomen Priscille VVeb nuper de Mootton Haller in Com' VVilt' Vid' in Cur' dicti nuper Regis de Banco præd' hic de placito Transgr' prædictaque Priscilla pro eo quod non ven' in præd' Cur' de Banco præd' præfat' Scarborough inde responsur' secundum legem & consuetud' hujus regni Angliæ in exigend' possit' fuit ad utlagand' in Com' Wiltes' præd' & ea racone postea scilicet quinto decimo die Maij anno regni dicti nuper Regis quarto in Com' Wiltes' prædict' debito juris modo ad sectam præd' Scarborough wariat' fuit & adhuc wariat' existit prout per Recordum & Process. inde in eadem Cur' dicti nuper Regis de Banco prædict' retornat' & modo residen' plenius liquet & apparet quæ quidem utlagat' adhuc in suis robore & effectu remanen' minime revescat' seu annihilat' Et hoc parat' est verificare per Recordum illud Unde petit Judicium si prædict' Priscilla accone suam prædict' inde versus eum habere debeat &c.

The Defendant pleads an Outlawry in Bar.

J. S. impleaded the Plaintiff,

In the Common Pleas.

In an Action of Trespass.

And for not appearing she was waived.

The Outlawry yet in force.

Et hoc parat' est verificare per Recordum.

Et prædict' Priscilla dicit quod prædictum placitum prædict' Francisci superius in Barram placitat' materiaque in eodem content' minus sufficien' in lege existunt ad ipsam Priscillam ab accone sua præd' versus eundem Franciscum habend' præcludend' quodque ipsa ad placitum illud modo & forma præd' placitat' necesse non habet nec per legem terræ tenetur respondere Et hoc parat' est verificare Unde p' defectu sufficien' Respons' prædict' Francisci in hac parte eadem Priscilla pet' Judicium & dampna sua accone non perform' p'mission' & assumpeon præd' sibi adjudicari &c.

Demur to the Plea.

Et prædict' Franciscus ex quo ipse sufficien' materiam in lege ad prædict' Priscillam ab accone sua prædict' versus eum habend' præcludend' superius allegavit quam ipse paratus est verificare Quam quidem materiam prædicta Priscilla non dedicit nec ad eam aliquatit' respondit set verifiacon' illam admittere omnino recusavit ut prius per Judic' & quod præd' Priscilla ab accone sua præd' versus eum habend' præcludatur &c. Et quia Justic' hic se advisare volunt de & super p'missis præd' priusquam Judic' inde reddant dies dat' est partibus præd' hic usque à die Sancti Michaelis in tres Septimanas de audiendo inde Judicio suo eo quod iidem Justic' hic nondum inde &c.

Joynder in Demur.

Priscilla Web Widow *versus* Moore.

The Plaintiff Declared in an Action upon the Case upon five several Promises, one whereof was upon a Quantum meruit, for sinning Meat and Drink for the Defendant at his Request.

The Defendant pleaded in Bar an Outlawry of the Plaintiff in this manner, (viz.) Quod quidam S. C. al' scilicet Termino Sanctæ Trinitat' anno regni nuper Regis Jacobi secundi tertio implacitavit p'd' Priscillam in Cur' dicti nuper Regis de Banco hic de placito transgress. prædict' quæ Priscilla pro eo quod non venit in prædict' Cur' de B. præd' præfat' S. C. inde responsur' secundum legem & consuetud' hujus regni Angl' in Exigendo posita fuit ad utlagand' in Com' Wiltes' & ea ratione postea scilicet quinto decimo die Maij anno regni dicti nuper Regis quarto in Com' Wiltes' præd' debito juris modo ad Sectam præd' S. C. waviata fuit & adhuc waviata existit prout per recordum & processum inde in eadem Cur' dicti nuper de Banco præd. retornat' & modo residens plen' liquet Quæ quidem Utlagaria adhuc in suis robore & effectu remanet minime reverts' seu annihilat' & hoc parat' est verificare per Recordum illud unde pet' Judicium si action' &c.

And to this Plea the Plaintiff Demurred.

1. For the Outlawry could not be pleaded in Bar to an Assumpsit upon a Quantum meruit; for there is no certainty of Debt appearing till the thing comes to be valued, and so cannot be forfeited. It was doubted, Whether Debt upon a Simple Contract was forfeited till 4 Co. Slade's Case?

But it was Resolved by the Court in this Case, that the Outlawry was a good Plea in Bar; for the Consideration created a Debt, tho' that Debt was not reduced to a certain Sum. Markham and Pitt in 3 Leon. 205. Outlawry pleaded in Bar to Trover, where it lies all in Damages: But this Action arose upon a property of Goods which would have been forfeited, 3 Leon. 197. where the King had granted all Forfeitures that accrued to him by the Outlawry of J. S. and the Grantee brought an Action.

But an Exception was taken to the pleading of the Outlawry; for it ought to have been set forth, that the Plaintiff did not appear upon the Exigent, and upon that waviata fuit & debito juris modo is too general, Fitzherb. Account 91. Traverses 31. Stamford 148.

And of this the Court doubted, and appointed to search Precedents of the Pleading. Et Adjornatur.

Kempe

Kempe *versus* Cory & al.

Quod vide ante ultimo Termino.

The Case was now moved again, and as to the Matter in Law it was held clear, that where A. is seised of a Third part in Common, and B. of the other two parts in Common with A. and A. let his Third part, reserving Rent, and B. puts in his Cattle, or a Stranger by his License, that such Cattle are not Distrainable for the Rent. But the Doubt was, because the Avowry was in loco in quo ut in & super prædict' tertiam partem, &c. Whether the Plaintiff should not have traversed the Taking in tertia parte tantum. Vide the Case of Newman and Moor in Hob. 80. & 103. And note there, that the Traverse was held unnecessary.

And the Court held clearly, that it would have been impertinent to make a Traverse in this Case; for the Matter in the Avowry was confessed and avowed.

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1824

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C A S E S

Adjudged upon

Writs of ERROR

I N T H E

Exchequer Chamber.

Termino Sancti Michaelis Anno 1 W. & M.

B Y

Pollexfen Chief Justice.

Powell,
Rokeby, } Justices.
Ventris,

Atkyns Chief Baron.

Nevill,
Lechmore, } Barons.
Turton,

Willows versus Lydcot.

Upon a Writ of Error upon a Judgment in Ejectment in B.R. which was brought for a Messuage in St. Martins in the Fields.

Upon the General Issue pleaded, and a Special Verdict found, the Point was to this effect:

William Shelton was seised in fee of the said Messuage, and of divers other Messuages situate in the said Parish of St. Martin, and other Parishes, and made his Will in Writing, and thereby devised his Houses in the other Parishes to divers Charitable Uses, and then devised to one Edward Harris and Mary his Wife the Messuage in question for their Lives; and then in the following Clause, the better to enable his Wife to pay his Legacies, he devised

devised all his Messuages, Lands, Tenements and Hereditaments whatsoever, within the Kingdom of England, (not above disposed of) to have and to hold to her and her Assigns for ever; and made her Executrix. And the Verdict was found, That Edward Harris and Mary his Wife were dead, and that the Testator left sufficient to his Wife to pay his Legacies, without the Reversion of the said Messuages devised to Harris and his Wife: That the Lessor of the Plaintiff was Heir at Law to the Testator, and that the Defendants claimed from Anne, Wife of the Testator, &c. & si super totam materiam &c. And Judgment was given in the Kings Bench for the Plaintiff.

And upon a Writ of Error brought in the Exchequer-Chamber, it was this Term Argued before the Justices and Barons, and by the Opinion of them all the Judgment was Reversed.

For they held, that there were words in the Devise to the Testators Wife that would carry the Reversion of this House as an Hereditament undivided of. Vide the Case of *Wicks and Walroon* in Allen's Rep. 28. one having a Mannor and other Lands in Somersetshire, Devised the Mannor to A. for Six years, and part of the other Lands to B. in fee; and then comes this Clause, —and the rest of my Lands in Somersetshire, or elsewhere, I give to my Brother; and it was adjudged by the word [Rest] the Reversion of the Mannor passed as well as the Lands not Devised before.

A Case about 20 years ago was cited by the Counsel for the Defendant, in the Writ of Error, between Bowyer and Milbanks, in a Borough where a Nuncupative Will would pass Lands by the Custom, a man upon his Death-Bed being asked about his Will, said, I Give All to my Mother, and repeated the words twice or thrice, Raymond's Rep. fo. 97.

It was held that would not pass the Land; for it was said, that it were hard that Lands should pass by a Parol Will by Custom, unless there be express and plain words to shew the Intention.

Chapman versus Flexman.

The Style of
the Court of
the *Exchequer*
Chamber.

PLACITA in Camera Scaccarij apud Westm^r coram Thoma Street Mil^r & Edwardo Lutwich Mil^r duobus Justic^r domini Regis de Comuni Banco & Thoma Powell Mil^r un^r Baron^r de Scaccario domini Regis de gradu de la Coife die Sabbati vicesimo quinto die Novemb^r anno regni domini Jacobi secundi Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei defensor &c. quarto.

Dominus

Dominus Rex mandavit dilecto & fideli suo Roberto Wright Mil' Capitali Justic' suo ad placita coram ipso Rege tenend' assign' Breve suum Clausum in hæc verba Jacobus secundus Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex fidei defensor &c. Dilecto & fideli nostro Roberto Wright Mil' Capitali Justic' nostro ad placita coram nobis tenend' assign' salutem Cum in Statuto in Parlamento Dominiæ Elizabethæ nuper Regin' Angl' apud Westm' vicesimo tertio die Novembr' anno regni sui vicesimo septimo tent' edit' int' cætera inactitat' fuit autoritat' ejusdem Parlamenti quod ubi aliquod Judic' ad aliquod tempus extunc postea reddit' foret in Cur' de Banco Regis in aliqua secta aut accone debiri detencon' convencon' compoti accon' super Casum Ejecon' firmæ aut Transgr' primum inchoat' aut primum ibidem inchoand' p'terea tantum ubi nos foremus pars sequen' aut defend' contra quam aliquod tal' Judic' reddit' foret ad suam eleccon' prosequi potest extra Cur' Cancellar' speciale breve de Error' devisand' in dicta Cur' Cancellar' Capitali Justic' dictæ Cur' de Banco Regis pro tempore existen' dirigend' mandans ill' causare dict' Record' ac omnia concernen' dict' Judic' Transferri coram Justic' de Communi Banco & Baron' de Scaccario in Camera Scaccarij ibidem examinand' per dictos Justic' de Communi Banco & Baron' præd' Qui quidem Justic' de Communi Banco & tales Baron' de Scaccario qui sunt de gradu de la Coife aut sex illorum ad minus virtute ejusdem Actus superinde plenam potestatem & autoritat' habuerunt ad examinand' omnes tales Error' qual' assignat' aut invent' fuerint in aut super aliquod tale Judic' & superinde reverfere aut affirmare dict' Judic' prout lex requireret præterquam pro Erroribus assignand' aut inveniend' pro aut concernen' Jurisdicconem præd' Cur' de Banco Regis aut aliquem defect' form' in aliquo Brevi retorn' Querela Billa Declaracone aut in alio placito processu veredicto aut procedencia quibuscunque Et quod postquam dict' Judic' affirmat' aut revocat' fuit dict' Record' ac omnia ill' concern' in dictam Cur' de Banco Regis removend' & reducend' erunt ut talis ulterior' process' superinde fiat tam pro execucon' quam alit' prout pertinebit sicut in dicto Statuto plenius continetur Ac quia in record' & process' ac etiam in reddicone Judic' loquelæ quæ fuit in Cur' nostra coram nobis per billam inter Rogerum Flexman & Johannem Chapman de quadam Transgr' super Casum eidem Rogero per præfat' Johannem illat' ut dicitur Error' intervenit manifestus ad grave dampnum ipsius Johannis sicut ex loquela sua accepimus Qui quidem Error' nullo modo tangit nos aut Jurisdiccon' præd' Cur' nostr' de Banco Regis prædict' aut aliquem defect' formæ in aliquo Brevi retorn' Querela Billa Declaracon' aut in alio placito vel procedencia quibuscunque ut accepimus Nos igitur volentes Errorem si quis fuerit juxta formam Statut' præd' corrigi & partibus præd' plenam & celerem Justic' fieri in hac parte vobis mand' quod si inde Judic' reddit' sit tunc Record' &

The Writ of Error.

& pcess. præd' cum omnibus a tangen' coram dictis Justic' de Comuni Banco & Baron' de Scaccario nostro prædict' in Camera Scaccarij nostri prædict' die Sabbati (videlicet) vicefimo sexto die instantis mensis Novembr' ven' fac' ut dicti Justic' & Baron' vis' & examinar' Record' & pcess. præd' ulterius inde Fieri fac' quod de jure & secundum formam Statut' præd' fuerit faciend' Teste meipso apud Westm' xiiij. die Novembr' anno regni nostri tertio:

Davies.

The Return
of the Writ.

Record' & pcess. præd' cum omnibus ea tangen' de quibus in brevi prædict' fit menço sequuntur in hæc verba.

Placita coram domino Rege apud Westm' de Termino Sancti Hill' annis regni domini Jacobi secundi nunc Regis Angliæ &c. secundo & tertio.

Rot' DCCCCLXIII.

The Memo-
randum.

Devon' ff. Memorandum quod alias scilicet Termino sancti Michaelis ult' præterit' coram domino Rege apud Westm' ven' Rogerus Flexman per Johannem Clifton Attorn' suum & protulit hic in Cur' dicti domini Regis tunc ibidem quandam billam suam versus Johannem Chapman in Custod' Mar' &c. de placito Transgr. super Casum Et sunt pleg' de pros' scilicet Johannes Doe & Ric' Roe quæ quidem

Declaration in
a Special
Action of the
Case, brought
by a Lessee of
an Ancient
Mill, for not
grinding at his
Mill.

Billæ sequitur in hæc verba: **Devon' ff.** Rogerus Flexman queritur de Johanne Chapman in Custod' Mar' Marefc' domini Regis coram ipso Rege existen' pro eo videlicet quod cum quidam Johannes Speccott Armig' secundo die Novembr' Anno Domini Millesimo sexcentesimo octogesimo quinto & diu antea & continue postea hucusque fuit & adhuc est seisit' de & in Maner' & Burgo de Torrington in Com' præd' ac de septem antiquis molend' aquat' suffic' ad molend' omnia grana & brasium inhabitantium infra Manerium & Burgum prædict' pro necessar' usibus suis molit' & ibidem expendit' sex eorum infra Manerium & Burgum de Torrington prædict' altero eorum extra Burgum prædict' sed infra prædict' Manerium præd' existen' Cumque etiam prædict' Rogerus Flexman prædict' secundo die Novembr' Anno Domini millesimo sexcentesimo octogesimo quinto supradict' & continue postea hucusque fuit & adhuc est tenens & firmar' præd' Johannis Speccott ad voluntat' prædict' Johannis præd' septem molendinorum aquaticorum granaicorum Et deinde possessionat' Et tolner' granorum & brasij in eisdem molendinis molit' per tempus illud habuisset & habere debuit Cumque etiam omnes inhabitant' in aliquibus antiquis mesuag' infra Manerium & Burgum prædict' existen' de jure debuerunt molire ad prædict' septem molendina aliqua sive aliquod eorum infra Manerium prædict' existen' omnia & omnimoda grana sua & brasium infra Manerium & Burgum prædict' post molitur' inde in prædict' mesuag' suis expendit' (Anglicè spent)

Seisin of the
Mannor and
Mills.

The Plaintiff
Farmer of the
Mills.

Et habuit &
habere debuit
the Toll.

ac

ac solvere pro molitur inde rationabile tolnet excepte tantummodo tal' grana & brasum Inhabitantium prædict' in antiquis mesuag' prædict' post molitur inde expendit qual' per possessorem sive possessores quorundam antiquorum molendinorum aquaticorum granaticorum (vocat' *Wear Mills* alias *Weargifford Mills*) jacen' extra Manerium & Burgum prædict' videlicet infra paroch' de Weargifford in Com' prædict' pro tempore existen' per se vel servientes suos super un' equinum oneratorium (Anglice *Loading-Hayse*) solummodo in Servizio ill' ad un' tempus impetis pro asportacone talium granorum & brasij ad prædict' molendin' (vocat' *Wear Mills* alias *Weargifford Mills*) & reportacone eorundem quando molit' onerari & portari possunt Cumque prædict' Johannes Chapman prædict' secundo die Novembr' Anno Domini Millesimo sexcentesimo octogesimo quinto supradict' & diu antea & continue postea hucusque fuit & adhuc existit occupatorem & possessorem unius antiqui mesuag' (vocat' *the Swanne*) jacen' & existen' infra Manerium & Burgum prædict' ac per totum tempus prædict' in eodem mesuag' vixit commoravit & inhabitavit & adhuc vivit commorat & inhabitat prædict' tamen Johannes Chapman præmissi non ignarus sed machinans & intendens ipsum Rogerum in hac parte callide & subdole decipere defraudare & pejorare prædict' secundo die Novembr' anno regni dicti domini Regis nunc primo erexit locavit & imposuit quoddam molendin' manuarium (Anglice vocat' a *Hand-Mill*) infra Manerium & Burgum prædict' (videlicet) in prædict' antiquo mesuag' ipsius Johannis Chapman ibidem Et prædict' secundo die Novembr' anno regni dicti domini Regis nunc primo supradicto & diversis aliis diebus & vicibus postea & ante exhibicon' Billæ ipsius Rogeri prædict' Mille modios Brasij ipsius Johannis Chapman infra Manerium & Burgum prædict' existen' & in prædicto antiquo mesuag' prædict' Johannis Chapman post molituram inde expendit in prædict' molendino (vocat' *the Hand-Mill*) moluit racone cujus prædict' Rogerus tolnetum quod ipse pro molitur inde ad prædict' molendina ipsius Rogeri lucrari potuit perdidit & amisit ad dampnum ipsius Rogeri quadraginta librarum Et inde producit sectam &c.

The Defendant
an Occupier of
an Ancient
Messuage,
which ought
to grind at his
Mills.

The Defendant
erected a
Hand-Mill and
ground there-
with.

Ratione cujus
the Plaintiff
lost his Toll.

The Defendant
Imparles.

And pleads
Not guilty.

Et modo ad hunc diem Lunæ prox' post Octab' sancti Hillar' isto eodem Termino usque quem diem prædict' Johannes Chapman habuit licenc' ad Billam prædict' interloquend' & tunc ad respond' &c. coram domino Rege apud Westm' ven' tam prædict' Rogerus per Attorn' suum prædict' quam prædict' Johannes Chapman per Johannem Lugg Attorn' suum Et idem Johannes Chapman defendit vim & injur' quando &c. Et dic' quod ipse non est inde Culp' Et de hoc pon' se super Patriam Et prædict' Rogerus silit' &c. Ideo ven' inde Jur' coram domino Rege apud Westm' die Sabbati prox' post Octab' Purificacon' Beatæ Mariæ Et qui nec &c. ad recogn' &c. Quia tam &c. Idem dies dat' est partibus prædict' ibidem &c. postea continuat' inde pcess' inter partes

*Postea.**Talis.**Verdict for the
Plain'iff.**The Judgment.**The Placita
in the Exche-
quer Chamber.*

prædict' de placito præd' per Jur' posit' inde inter eas in respect' coram domino Rege apud Westm' usque diem Lunæ prox' post tres Septimanas sancti Michaelis extunc prox' sequen'. Nisi Justic' dñi Regis ad Assisas in Com' prædict' capiend' assign' prius die Martis vicesimo sexto die Julij apud Castrum Exon' in Com' Devon' præd' per formam Statut' &c. ven' p defect' Jur' &c. ad quem diem coram domino Rege apud Westm' ven' præd' Rogerus per Attorn' suum prædict'. Et præfat' Justic' domini Regis coram quibus &c. miser' hic Record' suum coram eis habir' in hæc verba: II. Postea die & loco infracontent' coram Roberto Wriglar Mil' Capital' Justic' domini Regis ad placita coram ipso Rege tenend' assign' & Johanne Powell Mil' Justic' dicti domini Regis ad placita coram ipso Rege tenend' assign' Justic' ejusdem dicti domini Regis ad Assisas in Com' Devon' capiend' assign' per formam Statut' &c. ven' infranominat' Rogerus Flexman per Attorn' suum infracontent' & infrascript' Johannes Chapman licet solempnit' exact' non ven' sed default' fecit. Ideo Jur' unde infra sit menco capiatur versus eum per default'. Et Jur' Juræ illius exact' quidam eorum videlicet Willielmus Booth Andreas May Georgius Gregory Thomas Corrindon Thomas Rugg Samuel Hall Ambrosius Thomas & Petrus Clarke vener' & in Jur' ill' jurat' existunt. Et quia resid' Jur' ejusdem Jur' non comparuer'. Ideo al' de circumstantibus per Vic' Com' præd' ad hoc electi ad requisicon' prædict' Rogeri Flexman ac per mandat' Justic' præd' de novo apponuntur. Quorum nomina Panello infrascript' affilantur secundum formam Statut' in hujusmodi casu edit' & provis' ac Jur' sic de novo apposit' videlicet Hugo Bidwell Johannes Crauscombe VVilliclmus Avent & Johannes Sprye exact' silit' ven'. Qui ad veritatem de infracontent' simulcum al' Jur' prædict' prius impanelat' & jurat' dicend' elect' triat' & jurat' dicunt super Sacrum suum quod præd' Johannes Chapman est culpabilis de præmiss' infrascript' prout præd. Rogerus Flexman interius inde versus eum queritur. Et assidunt dampnum ipsius Rogeri Flexman occone inde ultra mis' & custag' sua per ipsum circa sectam suam in hac parte apposit' ad un' denar'. Et pro mis' & custag' ill' ad quadragiat' solid'. Ideo cons' est quod præd' Rogerus Flexman recuperet versus præfat' Johannem Chapman dampna sua prædict' per Jur' præd' in forma præd' Asses. necnon sexdecim libras pro mis' & custag' suis præd. eidem Rogero per Cur' dicti domini Regis nunc hic ex assensu suo de Incrō adjudicat'. Quæ quidem Dampna in toto se attingunt ad octodecim libras & un' denar'. Et præd' Johannes in misericordia &c.

Placita in Camera Scaccarij apud Westm' coram Edw' Atkins Mil' Capital' Baron' de Scac' dñi Regis de gradu de la Coife Thoma Jenner Mil' Richardo Heath & Thoma Powell Mil' tribus al' Baron' de Scaccario dñi Regis de gradu de la Coife necnon Thoma Street Mil' Edw' Lutwich Mil' & Christof. Milton Mil' tribus al' Justic' dñi Regis de

de Communi Banco vicesimo sexto die Maij anno regni domini Jacobi secundi Dei gratia Angliæ Scot' Franciæ & Hiberniæ Regis Fidei defensor &c. quarto.

Ad quem diem hic ven' prædict' Johannes Chapman per Johannem Lugg Atorn' suum Et dic' quod in Record' & pcess' prædict' ac etiam in reddicone Judic' præd' manifest' est errat' in hoc videlicet quod Judic' præd' in forma præd' reddit' reddit' existit pro prædict' Rogero versus prælat' Johannem Chapman ubi per legem terræ hujus regni Angliæ idem Judicium reddi debuisset pro præd' Johanne Chapman versus præd' Rogerum Ideo in eo manifeste est errat' Et petit quod Judicium præd' ob Errores prædict' & alios in Record' & pcess' præd. ac in reddicone Judicii præd. existen' revocetur annulletur & pro nullo penitus habeatur & quod ipse ad omnia quæ occasione Judic' præd. amisit restituatur &c. Et petit breve domini Regis Vic' Devon' dirigend' ad præmunien' præfat' Rogero essendi hic auditur' Record' & pcess' præd' & ei conceditur &c. Ideo Præcept' est Vic' quod probos &c. Scire fac' præfat' Rogero quod sit hic die — px futur' auditur' Record' & pcess' prædict' si &c. Et ulterius &c. Idem dies dat' est eidem Johanni Chapman hic &c.

The General
Errors assigned.

And a Scire
facias ad
audiendum
Errors prayed,

And awarded.

Et prædict' Rogerus Flexman dic' quod nec in Record' & pcess' prædict' nec in reddicone Judic' præd' in ullo est erratum Et petit etiam quod Cur' domini Regis & dominæ Reginæ hic procedat ad examinacon' tam Record' & pcess' præd' quam præd' causæ per ipm Johannem Chapman superius p erroribus assign' & allegat' Et quod Judic' præd' in omnibus affirmetur Et quia Cur' dicti domini Regis & dominæ Reginæ hic se advisare vult de & super præmiss. prius quam Judic' inde reddat dies dat' est partibus præd' usque diem Sabati — prox' futur' de Judicio suo inde audiend' eo quod Cur' domini Regis hic inde nondum &c.

The Defendant
in the Errors
appears and
pleads in nullo
est Erratum.

Chapman versus Flexman.

IN an Action upon the Case, in B. R. the Plaintiff declared, That one Jo. Specot 2 Novembr' 1685. & diu ante was seised of the Mannor and Burgh of Torrington, and of seven antient Water Corn Mills, sufficient to grind the Corn of the Inhabitants, within the Mannor and Burgh aforesaid, for their necessary uses; and that the Plaintiff was the day aforesaid & continue postea, Tenant at Will to the said Specot of the said seven Mills, and had the Toll of Corn, which was ground in the said Mills during the time aforesaid & habere debuisset: And whereas all the Inhabitants of any antient Messuage, within the Mannor and Burgh aforesaid, de jure debuerunt molere ad præd' septem molend' aliqua sive aliquod eorum omnia & omnimoda granâ sua infra Mefs' præd'

expensit ac solvere pro molitura inde rationab. tolnerum. And whereas the said Chapman the day aforesaid, & diu antea was Occupier of an ancient Messuage, within the Mannor and Burgh aforesaid; the said Chapman the 2 of Novemb^r. &c. Erected a certain Mill within the Mannor and Burgh aforesaid, and within his said Messuage, wherewith he did grind divers, (viz.) 1000 Bushels of Malt, which he spent in his said House; by Reason whereof, the said Flexman lost the benefit of the Toll of the said Malt which he should have had, ad damnum, &c.

The Defendant pleaded not Guilty, and a Verdict was found Plaintiff, and Judgment that he should Recover in B. R.

And the Error now insisted upon was, That the Plaintiff had not set forth any Title in his Declaration to the Toll, or any Custom or Prescription, for the Inhabitants of those ancient Houses, to bring their Corn to be ground there.

But by the Opinion of all the Court, the Judgment given in the Kings Bench was affirmed; for tis sufficient to say in this possessory Action, that during the time aforesaid, he had and ought to have the Toll; and that the Inhabitants debuerint molere, vide the Case of Dent and Oliver, in 2 Cro. 43. 122. vide Rastall Tit. molin', in Action sur le Case, fol. 90. F. N. B. 123. for an ancient Water-course said currere consuevit.

Note, That of Rastall cited by Pollexfen Chief Justice tis said, that the Inhabitants a toto tempore prædicto molere consueverunt, and the Writ and his Predecessors, are alleged to be seized of the Mill time out of mind; so that, that President does not seem to warrant the Judgment in this Case.

Sarsfeild versus Witherly.

FRancis Sarsfeild brought an Action upon the Case, against Hamond' Witherly in the Kings Bench, wherein he declared to this effect. Cum Civitas Paris in regno Franciæ est & tempore, &c. fuit antiqua Civitas Cumque etiam Civitas London in hoc regno est & a toto tempore, &c. fuit antiqua Civitas Cumque etiam duplex usantia in aliqua billa excambij mention' int' mercatores & al' person' apud Paris præd' residen' negotian' & commercium haben' & mercat' & al' person' apud London præd' residen', &c. & appunctuat' fore solut' apud London præd' acceptat' est & a toto tempore, &c. acceptat' fuit per spatium duorum mensium a dat' hujusmodi primæ Billæ Excambij Cumque etiam apud London præd', (viz.) in paroeh, &c. existit erà toto tempore, &c. habebatur antiqua consuetudo int' mercatores & al' person' apud Paris præd' residen' & negotian' & mercatores & al' person' apud London præd' residen' & negotian', (viz.) quod si aliquis mercator sive al' persona apud Paris præd' residen'

fiden' & negotian' fecerit primam Billam Excambij pro aliqua denar'
 summa & alicui al' mercator sive al' personæ apud London præd'
 residen' & negotian' direxit & requisivit ad duplicem usantiam hu-
 jusmodi primæ billæ Excambij secunda minime solut' ad solvend' ali-
 cui al' mercat' sive al' person' vel ordini suo aliquam denar' sum' pro
 valore recept' de hujusmodi mercator' sive al' persona cui vel ejus
 ordini hujusmodi denar' summa per hujusmodi prim' billa Excambij
 appunctuat' fuit solvendum & ante solutionem & satisfactionem inde
 per indorsamentum in scriptis manu sua propria subscript' & indorsat'
 super hujusmodi primam billam Excambij ordinavit hujusmodi denar'
 sum' solvi ordini alicujus alij mercator' in hujusmodi indorsament'
 nominat' valore recepto de illo Et si hujusmodi mercator sive al'
 persona cui vel ejus ordini hujusmodi denar' summa per hujusmodi
 indorsament' appunctuat' fuit solvend' per secund' indorsament' su-
 per hujusmodi primam billam Excambij ordinavit hujusmodi denar'
 sum' solvi ordini alicujus alij mercator' sive al' personæ ac si post
 hujusmodi sepeal' indorsament' & noticiam inde dat' hujusmodi
 mercator sive al' personæ cui hujusmodi prima billa Excambij sic fuit
 discess' & quod ille non solveret hujusmodi denar' summam hujusmodi
 mercator' sive al' personæ cui per hujusmodi secundum indorsament'
 prædicta solutio inde appunctuat' fuit sed pro defectu solutionis
 hujusmodi mercator sive al' persona in hujusmodi secundo indorsa-
 mento nominat' ad finem duorum mensium à dat' hujusmodi primæ
 billæ Excambij protestare sive protestari causaret secund' præd' con-
 suetud' mercator hujusmodi primam billam Excambij Et si post
 hujusmodi protestationem hujusmodi mercator sive al' persona in
 hujusmodi primo indorsamento nominat' solveret & satisfaceret hu-
 jusmodi mercatori sive al' personæ in hujusmodi secundo indorsamen-
 to mentionat' hujusmodi denar' summam in prima billa Excambij
 content' quod tunc hujusmodi mercator sive al' persona qui hujus-
 modi primam billam Excambij fecerit onerat' & onerabil' existit per
 consuetud' ad solvend' hujusmodi denar' summam hujusmodi merca-
 tori sive al' personæ cui solutio inde per hujusmodi primum indorsa-
 mentum appunctuat' fuit Cumque etiam præd' Hammond Witherly
 die, &c. apud Civitat' Patis præd' apud London præd' in Parochia
 & Warda præd' residens & negotians & Mercator ibid. existens eodem
 die, &c. Stilo novo apud Paris, &c. secundum consuetud' mercator
 præd' fecit quandam primam suam billam Excambij manu sua pro-
 pria subscript' geren' dat', &c. cuidam T.W. in parochia & Warda præd'
 residen' & negotian' direct' & per eandem requisivit præd' T. W. ad
 duplicem usantiam dictæ suæ primæ billæ Excambij (secunda sua
 minime solut' existen') ad solvendum cuidam W. Ellis sive ordini
 plenam summam septuaginta & quatuor librarum pro valore recept'
 quam quidem billam postea & ante finem quatuor mensium à dat'
 ejusdem scilicet die, &c. apud, &c. præd' W. Ellis per indorsamen-
 tum manu sua propria subscript' & indorsat' secundum consuetud'
 &c.

&c. ordinavit præd' septuaginta & quatuor libras fore solut' ordini præd. Francisci Sarsfield mercator' adtunc & ibidem existen' &c. valore de illo, &c. idemque Franciscus ante solutionem Billæ præd. & ante finem duorum mensium à dat', &c. scilicet — die, &c. apud *London*, &c. per secundum indorsamentum manu sua propria subscript' super illam primam Billam excambij secund' præd' consuetud' ordinavit præd' 74 l. fore solut' ordini cujusdam Johannis Comin mercator' adtunc & ibidem existen' & quod de præd' sepeal' indorsament' præd' Tho. W. postea scilicet — die &c. apud L. præd' noticiam habuit Et præd' Franciscus Sarsfield in facto dicit quod præd' T. W. à fine duorum mensium à dat', &c. seu hucusque non solvit prædict' Johanni Comin præd' 74 l. & quod pro defectu solutionis præd' J. C. ad finem duorum mensium à dat', &c. scil' — die, &c. apud L. præd' in Paroch. &c. protestavit seu protestari causavit præd' primam Billam excambij secund' consuetud', &c. & ulterius in facto dicit quod ipse idem Franciscus postea scil' 20 die Septembr' Anno 1681. apud L. &c. solvit præfat' Johanni Comin prædict' septuaginta & quatuor libras ratione quorum quidem præmiss' & consuetud' præd' p'd Hamond Witherly onerat' & onerabil' est & per consuetud' præd' onerat' & onerat' esse consuevit ad solvend' præfat' Francisco præd' sum' 74 l. in prædict' prima Billæ excambij mentionat' ac idem Hamond in consideracone præmissor' postea scil' eodem 20 die Septembr' apud L. prædict', &c. super se assumpsit & eidem Francisco adtunc & ibid' fideliter promisit quod ipse idem Hamond præd' 74 l. eid' Francisco bene & fideliter solvere vellet Cumque etiam præd' Hamond postea scilicet eodem die, &c. indebit' fuit eidem Francisco in al' 74 l. pro confim' denar' summa per eundem Franciscum ad requisiconem ejusd' Hamond ante tempus illud erogat' & sic inde indeb' existen' idem Hamond in consideracone inde postea scilicet eod' die, &c. apud L. &c. super se assumpsit & eidem Francisco adtunc & ibidem fideliter promisit quod ipse idem Hamond præd' 74 l. ult' menconat' eidem Francisco cum inde postea requisit' esset bene & fideliter solvere & contentare vellet prædict' tamen Hamond sepeales promiss' & assumpsit &c. minime curans sed machinans, &c. prædict' sepeal' denar' summas in toto se attingen' ad 148 l. seu aliquam partem eidem Francisco non solvit, &c. licet ad hoc faciend', &c. sæpius postea apud *London*, &c. requisitus fuit, &c. Unde idem Franciscus dicit quod ipse deteriorat' est & dampnum habet ad valenciam 60 l. & inde producit sectam, &c.

The Defendant as to the second Promise pleaded Non Assumpsit & quoad residuum præd' Transgr' super Casum in Narr' præd' idem Hamond dicit quod prædict' Franciscus actionem suam habere non debet quia protestando non eorum aliqua superius inde allegat' fore vera protestando etiam quod præd' narratio inde ac materia in eadem content' minus sufficien' in lege existunt ad actionem præd' manuteniend' p' placito idem Hamond dicit quod ipse est filius & hæres

apparens

apparens præd' Thomæ VVitherly superius nominat' quodque ipse idem Hamond pro ejus meliore educatione videndo partes & gentes extraneos ac notando & intelligendo mores & linguas earum ante prædict' tempus quo supponitur Billa' excambij prædict' fieri ex licentia domini Regis peregrinatus fuit ut generosus Anglican' in part' Transmarin' ac dicto tempore quo, &c. fuit apud Civitat' Paris præd' ut hujusmodi generosus ac peregrinator ac nulla alia de causa absque quod hoc quod ipse idem Hamond est vel unquam fuit Mercator seu persona per viam merchandizandi negotians int' Civit' Paris in part' Transmarin' & Civit' London' vel apud eorum alter' vel alibi ubicunque prout præd' Francisc' superius supponitur & hoc parat' est verificare Unde petit Judicium si prædict' Franciscus actionem, &c.

To this the Plaintiff Demurred.

1. It was said, that the Plea amounted to the General Issue; for if the Matter of it would avail the Defendant, it might be given in Evidence upon Non assumpsit.

To which it was Answered, That it was no General Rule, that a Matter could not be pleaded specially, which might be given in Evidence upon the General Issue. In an Action of Debt for Rent, an Entry and suspension of the Rent may be given in Evidence upon Nil debet; yet 'tis always allowed to be pleaded, and so Nil habuit in reneementis; and whetever the Matter pleaded contains Matter of Law it is allowed to be pleaded, tho' it might be shewn upon the General Issue, Hob. 127.

And of that Opinion were the Court.

2. But then it was said for the Plaintiff, That the Plea was insufficient in the Matter of it; for the Custom is laid for Merchants and other persons resident and negotiating at Paris; and the very Drawing of the Bill of Exchange is a negotiating in it self, and the practice is so frequent between all persons, as well as Merchants, to negotiate by Bills of Exchange, that it would prove a great Inconvenience, if they should not be of the same effect between others as well Merchants.

And the Court were all of Opinion, that the Plea of the Defendant was Insufficient, and that he having Drawn this Bill was obliged by it, according to the course of Bills of Exchange; and whereas Judgment was given in the Kings Bench upon this Record for the Defendant, they Reversed the said Judgment, and gave Judgment for the Plaintiff.

Termino Paschæ, Anno 2 Willielmi & Mariæ.

In Scaccario.

Cramlington versus Evans and Percival.

*The Placita
in the Exche-
quer Chamber.*

PLACITA in Camera Scaccarij apud Westm' coram Roberto Atkyns Mil' Capital' Baron' de Scaccario domini Regis & dominæ Reginæ de gradu de la Coife Henrico Pollexfen Mil' Capital' Justic' domini Regis & dominæ Reginæ de Communi Banco Johanne Powell Mil' Johanne Rokeby Mil' & Peyton Ventris Mil' tribus al' Justic' domini Regis & dominæ Reginæ de Communi Banco necnon Edwardo Nevill Mil' & Johanne Turton Mil' duobus al' Baron' de Scaccario domini Regis & dominæ Reginæ de gradu de la Coife die Sabbati decimo quinto die Junij anno regni domini Willielmi & dominæ Mariæ Dei gratia Angl' Scot' Franc' & Hiberniæ Regis & Reginæ Fidei defensor &c. primo.

*The Writ of
Error.*

Dominus Rex & Domina Regina mandaver' dilecto & fideli suo Johanni Holt Mil' Capital' Justic' suo ad placita in Cur' ipsorum domini Regis & dominæ Reginæ coram ipsis domino Rege & domina Regina tenend' assign' breve suum Clausum in hæc verba: ff. Gulielmus Tertius & Maria secunda Dei gratia Angl' Scotiæ Franciæ & Hiberniæ Rex & Regina Fidei defensor &c. dilecto & fideli nostro Johanni Holt Mil' Capital' Justic' nostro ad placita coram nobis tenend' assign' salutem Cum in Statuto in Parlamento dominæ Elizabethæ nuper Reginæ Angl' apud Westm' vicesimo tertio die Novembris anno regni sui vicesimo septimo tent' edit' int' cætera inactitat' fuit authoritat' ejusdem Parlamenti quod ubi aliquod Judicium ad aliquod tempus extunc postea reddit' foret in Cur' de Banco Regis in aliqua secta aut accone debiti detencon' convencon' comput' Accon: super Casum Ejecon' firmæ aut Transgressionis primum inchoat' aut primum ibidem inchoand' præterea tantum ubi nos foremus pars querens aut defendens contra quem aliquod tale Judicium reddit' foret ad suam eleccon' prosequi potest extra Cur' Cancellar' special' breve de Error' devisand' in dictam Cur' Cancellar' Captal' Justic' Cur' de Banco Regis pro tempore existen' dirigend' mandans ill' causare dict' record' ac omnia concernen' dict' Judicium transferri coram Justic' de Communi Banco & Baronibus de Scaccario in Camera Scaccarij ibidem examinand' pro

per dictos Justic' de Communi Banco & Barones prædictos Qui quidem Justic' de Communi Banco & tales Barones de Scaccario qui sunt de gradu de la Coife aut sex illorum ad minus Virtute ejusdem Actus superinde plenam potestatem & Authoritatem habebunt examinandum omnes tales Errores qual' Assign' aut invent' fuerint in aut super aliquod tale Judicium & superinde reversare aut affirmare dictum Judicium prout lex requirit præterquam pro Erroribus assign' aut inveniend' pro aut concernen' Jurisdiccionem prædict' Cur' de Banco Regis aut aliquam defectum formæ in aliquo Brevi retorn' Querela Billa Declaracon' aut in alio placito processu veredicto aut procedentia quibuscunque Et quod postquam dictum Judicium affirmat' aut reversum fuerit dictum Record' ac omnia illud concernen' in dictam Cur' de Banco Regis removend' & reducend' erunt ut talis ulterior processus superinde fiat tam pro execucone quam aliter put pertinebit sicut in dicto Statuto plenius continetur Ac quia in Record' & processu ejusdam loquelæ quæ fuit in Cur' domini Jacobi secundi nuper Regis Angl' &c. coram ipso nuper Rege per Billam inter Stephanum Evans & Petrum Percival & Lancelot' Cramlington de quadam Transgr' super Casum eisdem Stephano & Petro per præfat' Lancelot' illat' necnon in reddicon' Judicij ejusdem loquelæ versus præfat' Lancelot' in Cur' nostra coram nobis ut dicitur Error intervenit manifestus Ad grave dampnum ipsius Lancelot' sicut ex Querela sua accepimus Qui quidem Error' nullo modo tangit Nos aut Jurisdiccion' prædict' Cur' nostræ de Banco Regis prædict' aut aliquem defectum formæ in aliquo Brevi retorn' Querela Billa Declaracone aut in alio placito processu veredicto aut procedentia quibuscunque ut accepimus Nos igitur volentes Errorem si quis fuerit juxta formam Statuti prædict' corrigi & partibus præd' plenam & celerem Justiciam fieri in hac parte vobis mandamus quod si Judicium inde reddit' sit tunc Record' & process' prædict' cum omnibus ea tangen' coram dictis Justic' de Communi Banco & Baronibus de Scaccario nostro prædict' in Camera Scaccarij nostri prædict' die Sabbati (videlicet) decimo quinto die instantis Mensis Junij Venire fac' ut dicti Justic' & Barones vis' & examinat' record' & process' prædict' ulterius inde Fieri fac' quod de jure & secundum formam Statut' præd' fuerit faciend' Teste nobis ipsis apud Westm' quarto die Junij anno Regis nostri primo.

Fisb.

Record' & Process' prædict' cum omnibus ea tangen' de quibus in Brevi prædict' sit mencio sequitur in hæc verba:

Placita coram domino Rege apud Westm' de Termino Pasche anno regni domini Jacobi secundi nunc Regis Angl' &c. secundo.

The Return of
the Writ of
Error.
The Placita.

Rot' C XC II.

Qq

London

The Memorandum.

Declaration upon an Inland Bill of Exchange. The Custom set forth.

Any Merchant, or other person.

Vel ordini suo.

Super visum acceptavit.

Et sic per Indorsamentum appunctuaret, &c.
Pro valore in hujusmodi Indorsamento.
Upon refusal to pay.

Then the Merchant to become chargeable.

London ff. Memorandum quod al' scilicet Termino sancti Hillar' ult' praterit' coram domino Rege apud Westm' ven' Stephanus Evans & Petrus Percival per Johannem Normanfell Attorn' suum Et protuler' hic in Cur' dicti domini Regis tunc ibidem quandam Billam suam vers' Lancelot' Cramlington in Custod' Mar' &c. de placito Transgr' super Casum Et sunt pleg' de prosequend' scilicet Jolian' Doe & Rich' Roe Quæ quidam Billa sequitur in hæc verba: ff. *London* ff. Steph' Evans & Petrus Percivall queruntur de Lancel' Cramlington in Custod' Mar' Marefc' domini Regis coram ipso Rege existen' pro eo videt' quod cum infra hoc regn' Angl' videt' in paroch' Beate Mariæ de Arcubus in Warda de Cheape Lond' præd' habetur & existit & à tempore cujus contrar' memoria hom' non existit habebatur & fuit quædam consuet' int' mercatores & al' person' infra hoc regn' Angl' residen' & commerciu habentes usitat' & approbat' videt' quod si aliquis mercator vel al' person' infra regn' Angl' residen' fecerit aliquam Billam excambij secund' usum mercator' & hujusmodi Billam excambij sua ppe' manu subscripsit. & eandem Billam excambij secund' usum mercator' alicui al' mercat' sive al' personæ infra hoc regn' Angl' direxit & p eand' Billam excambij requisivit hujusm' mercator' sive al' person' cui hujusm' Billa excamb' sic fuerit direct' ad solvend' aliquam denar' sum' in hujusm' Billa excambij menconat' ad aliquod tempus in hujusm' Billa excambij limitat' alicui al' mercatori sive person' in hujusm' Billa excambij nominat' vel ordini suo p usu alicujus al' mercator' sive person' in hujusm' Billa nominat' p consimili valore in hujusm' Billa menconat' fore recept' de aliquo al' mercat' sive person' in hujusm' Billa excamb' nominat' & ad locand' hujusm' denar' sum' ad comput' put p advisam Et si hujusm' mercat' sive al' person' cui hujusm' Billa excambij sic direct' foret super visum hujusm' Billæ excambij acceptaret hujusm' Bill' excambij secund' usum mercat' ad solvend' hujusm' denar' sum' in hujusm' Billa mencon' secund' tenor' hujusm' Billæ excambij Et si hujusm' mercat' sive al' person' cui vel ejus ordini soluco hujusm' denar' sum' in hujusm' Billa excambij menci appunct' fuerit fiend' p Indors' hujusm' Billæ excambij ordinavit content' hujusm' Billæ excambij solvend' aliquibus al' mercat' sive al' person' in hujusm' Indors' nominat' vel ordini eorum p valore in hujusm' Indorsament' mencon' fore recept' de hujusm' personis in hujusm' Indors' nominat' Ac si hujusm' mercat' sive al' person' qui hujusm' Bill' excambij sic acceptaverit postea recusavit solvere hujusm' denar' sum' in hujusm' Billa excambij menconat' hujusm' mercat' sive al' personis in hujusm' Indorsament' hujusm' Billæ excambij nominat' quibus vel quorum ordini soluco inde p hujusm' Indors' hujusm' Billæ excambij appunctuat' foret fiend' secund' tenorem hujusm' Billæ excambij tunc hujusm' mercat' sive al' person' qui hujusm' Billam sic fecit super noticiam hujusm' recusaton' onerabilis extitit & à toto tempore supradict' onerabilis existit & onerat' esse consuevit solvere hujusmodi denar' sum' in hujusm' Billa excambij menci hujusm' mercat' sive al' personis in hujusmodi Indorsament' hujusm' Billæ excambij nominat' quibus

quibus vel quorū ordini soluc' inde pro hujusm' Indors. hujusm' Billæ
 excambij sic ut præfertur appunct' foret fiend' Ac iidem Steph' & Petrus
 in facto die quod præd' Lancelot' Cramlington infra hoc regn' Angl'
 scilicet apud Villam & Com' Novi Castri super Tinam residen' &
 mercator existen' decimo die Novembris Anno Dom' MDCLXXXV.
 apud Villam & Com' Novi Castri prædict' secundum usum merca-
 tor' præd. fecit quandam solam Billam suam excambij in scriptis geren-
 dat' eisdem die & anno & eand' Billam manu sua ppr' subscripsit
 & eandem Billam cuidam Willielmo Ryder adtunc in Lond' prædict'
 in paroch' & warda præd' residen' & artem Mercatoris ibidem exerc'
 direxit & per eandem Billam excambij idem Lancelot' Cramlington
 adtunc & ibidem requisivit præd' Willielm' Ryder ad vigint' & quinq;
 dies post dat' ejusdem solæ Billæ suæ excambij solvere cuidam Tho-
 mæ Price (adtunc apud Lond' præd' in paroch' & ward' præd' residen'
 & mercator' ibidem existen' vel ordini suo quingent' libr' p usu Fel'
 Calvert Armig' p consimili valore recept' ibidem (scilicet apud Villam
 & Com' Novi Castri præd') de Magistro Franc' Clever & locare ill' ad
 comput' prout p advisament' Quodque Billa excambij præd' postea
 scilicet decimo quarto die Novembr' anno supradicto apud Lond' præd.
 in paroch' & ward' præd' præfat' Willielmo Ryder præsentat' fuit
 idemque Willielm' Ryder eandem Billam adtunc & ibidem scilicet eo-
 dem decimo quarto die Novembris anno supradicto apud Lond' præd.
 in paroch' & ward' secundum usum mercator' præd. acceptavit quod-
 que præd' Thomas Price cui vel ejus ordini soluc' denar' prædict'
 in Billa excambij præd' menconat' per eandem Billam appunctuat'
 fuit fiend' postea scilicet eodem decimo quarto die Novembris anno
 supradicto apud Lond' prædict' in paroch' & ward' præd' p valore p
 eundem Thomam Price de eisdem Stephano Evans & Petro Percivall
 adtunc & ibidem habit' & recept' per Indorsamen' ejusdem Billæ ex-
 cambij secund' consuetud' Mercator' præd' ordinavit content' ejusdem
 Billæ excambij solvi præfat' Petro Percivall & Stephano Evans ad-
 tunc apud Lond' prædict' residen' & Mercator' ibidem existen' quod-
 que prædict' Willielmus Ryder postea scilicet quinto die Decembris
 anno supradicto apud Lond' prædict' in paroch' & ward' de præmiss.
 prædict' habuit notie' ac per eosdem Stephanum & Petrum adtunc
 & ibidem requisit' fuit ad solvend' eandem denar' sum' in eadem
 Billa excambij menconat' eisdem Stephano & Petro secund' formam
 & effect' præd' Indors' Billæ excambij præd' quod ipse idem Willielm'
 adtunc & ibidem facere penitus recusavit de omnibus quidem præmiss.
 idem Lancelot' Cramlington postea scilicet primo die Januar' anno
 ult' supradict' apud Lond' prædict' in paroch' & ward' præd' notie'
 habuit ac ratione inde ac per consuetud' præd' à toto tempore præd'
 usitat' & approbat' idem Lancelot' ad solvend' eandem quingent' libr'
 eisd' Stephano Evans & Petro Percivall onerabil' & onerat' devenit
 Ex superinde idem Lancelot' Cramlington in considerac' præmiss. postea
 scilicet eodem primo die Januar' anno ult' supradicto apud Lond'
 præd'

The Defendant
 being a Mer-
 chant at New-
 castle, drew a
 Bill upon one
 J. S.

Payable to one
 Price.
 Merchant in
 London.

Value received

The Bill pre-
 sented to J. S.
 And by him
 accepted.

Price orders
 payment to
 the Plaintiff

J. S. had notice
 and the Money
 demanded of
 him.

But he refused
 payment.

Of which the
 Defendant had
 notice.

And became
chargeable, and
thereupon
promised pay-
ment.

But altho' often
sought non
soluit.

Impairance.

Protestando,
that there is
no such Co-
stom.

præd' in paroch' & ward' præd' super se assumpsit & eisdem Steph' & Petro adtunc & ibidem fidelit' pmissit quod ipse idem Lancelot' prædict' quingent' libr' eisdem Stephano & Petro cum inde requisit' esset bene & fidelit' solvere & contentare vellet prædict' tamen Lancelot' pmission' & assumpcon' suas præd' in forma præd' fact' minime curan' sed machinan' & fraudulent' intenden' eosdem Steph' & Petr' in hac parte callide & subdole decipere & defraudare præd' quingent' libr' Bill' excambij præd' menc' seu aliquam inde denar' eisdem Steph. & Petro seu eorum alteri nondum solvit (licet ad hoc faciend' postea scilicet eod' primo die Jan' anno suprad' apud Lond' præd' in paroch' & ward' præd' idem Lanc' p præfat' Steph' & Petr' requisit' fuit) sed ill' eis seu eorum alteri solvere hucusque omnino recusavit & adhuc recusat unde iidem Steph' & Petr' dic' qd' ipi' deteriorat' sunt & dampnum habent ad valenc' sexcentar' libr' Et inde pduc' sectam &c.

Et modo ad hunc diem scilicet diem Mercurij p^x post Quinden' Paschæ isto eodem Termino usque quem diem præd' Lancelot' habuit licenc' ad Bill' præd' interloquend' & tunc ad respondend' &c. coram domino Rege apud Westm' ven' tam præd' Steph' & Petr' p Attorn suum prædict' quam præd' Lancelot' p Adam' Baynes Attorn' suum Et idem Lancelot' defend' vim & injur' quando &c. Et dic' quod præd' Steph' & Petrus Accon' suam præd' inde versus ipsum habere seu manuteneare non debent Quia prestando quod non habetur nec exist' nec à toto tempore supradict' habebatur vel fuit quædam consuet' int' mercator' & al' personas infra hoc regn' Angl' residen' & Commere' habentes usitat' & approbat' quod si aliquis Mercator vel al' person' infra hoc regn' Angl' residen' fecerit aliquam Billam excambij secund' usum Mercator' & hujusmodi Billam excambij sua ppr' manu subscrip' & eandem Billam excambij secundum usum mercator' alicui al' mercatori sive al' personæ infra hoc regn' Angl' residen' direxerit & per eandem Billam excambij requisiverit hujusm' mercat' sive al' person' cui hujusm' Billam excambij fuit direct' ad solvend' aliquam denar' sum' in hujusm' Billam excambij menconat' ad aliquod tempus in hujusm' Billam excambij limitat' alicui al' mercatori sive personæ in hujusmodi Billam excambij nominat' vel ordini suo p usu alicujus al' mercator' sive person' in hujusmodi Billam nominat' p consimili valore in hujusmodi Billam excambij menconat' fore recept' de aliquo al' mercat' sive person' in hujusm' Billam excambij nominat' & ad locand' hujusm' denar' sum' ad Comput' prout p advisament' Et si hujusmodi mercator sive al' person' cui hujusmodi Billam excambij sic direct' foret super visum hujusm' Billam excambij acceptaret hujusm' Billam excambij secund' usum mercat' ad solvend' hujusm' denar' sum' in hujusm' Billam menconat' secundum tenor' hujusmodi Billam excambij Et si hujusm' mercat' sive al' person' cui vel cujus ordini soluto hujusm' denar' sum' in hujusm' Billam excambij menconat' appunctuat' fuerit fiend' p Indors' hujusm' billam Excambij ordinavit content' hujusm' billam Excambij solvend' aliquibus al' mercat' sive al' person' in hujusm' Indors' nominat' vel ordini eorum p valore

in

in hujusm. Indors. menc' fore recept' de hujusmodi person' in hujusm' Indors. nominat' ac si hujusm' mercat' sive al' person' qui hujusm' billam Excambij sic accept' postea recusaverit solvere hujusm' denar' in hujusm' billa Excambij menc' hujusm' mercat' sive al' person' in hujusm' Indors. hujusm' billæ Excambij nominat' quibus vel quorum ordini soluco inde p' hujusm' Indors' hujusm' billæ Excambij appunct' fore fiend' secund' tenor' hujusm' billæ Excambij tunc hujusm' mercat' sive al' person' qui hujusm' billam Excambij sic fecerit super notie' hujusm' recusacon' onerabilis extitit & à toto tempore suprad' onerab' extitit & onerat' esse consuevit solvere hujusm' denar' sum' in hujusm' billa Excambij menc' hujusm' mercator' sive al' personis in hujusm' Indors. hujusm' billæ Excambij nominat' quibus vel quor' ordini soluco inde p' Indors' hujusm' billæ Excambij sic ut præfertur foret fiend' modo & forma prout p'd Stephanus & Petrus per billam suam præd' superius allegaver' Pro placito tamen idem Lancelot' die' quod diu ante diem exhibicion' billæ præd' Felix Calvert Arm' in billa præd' superius nominat' existen' un' Commissionar' & Gubernator omni' Ratar' Imposicon' & Debit' Excise super Cervisiam lupular' (Anglicè *Beer*) Cervisiam (Anglicè *Ale*) Pyracon' (Anglicè *Perry*) Pomac' (Anglicè *Cider*) Mellicrati (Anglicè *Me-thegils*) & omnium al' liquorum Excisabil' die' dño Regi nunc debet' & solubil' infra regn' Angl' Dom' Walliæ & villam Bervici super Tweed decimo die Novemb' anno regni regni dicti domini Regis nunc primo supradicto apud præd' Villam Novi Castri super Tinam solvit eidem Lancelot' per manus præd' Francisci Clever præd' quingent' libr' de denar' eidem domino Regi nunc accrescen' & renovan' de Debit' Excise super liquores Excisabil' præd' in præd' Villa & Com' Novi Castri super Tinam & Com' Northumbr' ad intencon' quod prædict' quingent' libr' solut' forent eidem Felici Calvert p' usu dicti dñi Regis nunc apud Civic Lond' præd' posteaque scilicet eodem decimo die Novembris anno primo supradicto apud præd' Villam Novi Castri super Tinam ad requisicon' præd' Felicis idem Lancelot' præd' billam Excambij fecit & subscripsit & præd' Wilhelmo Ryder direxit & per eandem billam requisivit præd' Willielm' Ryder ad solvend' prædict' Thome Price præd' quingent' libr' p' usu præd. Felicis modo & forma in billa præd' mencionat' Et idem Lancelot' ulterius die' quod præd' Felix se ut præfertur Commissionar' & Gubernator debet' Excise præd. existen' postea scilicet vicesimo quarto die Novembris anno primo supradicto & ante diem exhibic' billæ præd' eidem domino Regi nunc indeb' existeret in diversis denar' sum' attingen' in toto ad quinque mille libr' legalis monet' Angl' & amplius ratione præmiss' put per Record' Scac' dicti dñi Regis nunc apud Westm' in Com' Midd' plen' liquebat & apparebat Quodque præd. Fel' Calvert præd' quinque mille libr' eidem dño Regi nunc non solvit nec solvi fecit ratione ejus taliter superinde in Cur' Scac' peoff. fuit quod postea scilicet eodem vicesimo quarto die Novembris anno regni dicti domini Regis nunc primo supradicto quoddam Breve dicti domini Regis nunc de

Pro Placito,
That one Calvert an Excise-man paid the Defendant the Money in question by the hands of one Cleaver, being the Kings Money.

To the intent that it should be paid to the King.

And the Defendant afterwards at Calvert's Request drew the Bill. That Calvert was then indebted to the King.

Prout per Record' Scaccarij.

Extendi

An Extent
issued out
thereupon.

*Ad inquiren-
dam.*

The Writ deli-
vered to the
Sheriffs.

An Inquisition
taken by them.

Extendi fac' à dicta Cur' Scac' dicti domini Regis nunc apud Westm sub Sigillo ejusdem Cur' & Vic' Lon' direct' pro præd' Debit' quinque mille librar' versus præd' Felicem Calvert debito modo emanavit per quod quidem breve idem dominus Rex nunc eisdem tunc Vic' Lond' præcepit quod iidem Vic' non omitterent ppt' aliquam libert' quin eam ingred' ac tam p' sacrum' p'borum & legal' hom' de balliva præfat' Vic' vel alit' per sacrum' & testimoniū aliquorum proborum & legal' hom' de eadem balliva præfat' Vic' per quos rei veritas melius scir' potuisset qm' omnibus aliis viis mediis & modis quibus iidem Vic' sivistent aut potuissent diligent' inquirerent quæ & cujusmodi bona & catalla & cujus precij. Ac quæ debit' special' & denar' sum' idem Fel' Calvert tunc habuit in dicta balliva præfat' Vic' eaque omnia & singula præd' bona & catalla debit' credit' special' & denar' sum' in quorumcunq; manus tunc exist' p' sacrum' præfat' prob' & legal' hom' diligent' apprec' & extendi ac in manus dicti dom' Regis nunc capi & seiscire fecerint ut idem dom' Rex nunc ea quousq; sibi de debito pd' plen' satisfact' haberet juxta form' Stat' p' hujusm' debit' dicti domini Regis recuperand' inde nuper edit' & p'vis'. Et qualiter præcept' ill' fuerit execut' iidem Vic' contrar' facerent Bar' de Scac' pd' apud Westm' præd' vicesimo sexto die instant' mensis Novemb'. Quod quidem breve postea & ante retorn' ejusdem scilicet vicesimo quatto die Novemb' anno regni dicti dñi Regis nunc primo supradicto apud Lond' præd' in paroch' & ward' præd' quibusdam Benj' Thorowgood Mil' & Thomæ Kinley Mil' ad tunc existen' Vic' Lond' præd' deliberat' fuit in deb' juris forma exequen'. Et præd' Lancelot' ulterius dic' quod postea & ante diem exhibic' Billæ præd' necnon ante retorn' brevis præd' scilicet vicesimo quinto die Nov' anno regni dicti domini Regis nunc primo supradicto præd' Benj' Thorowgood & Tho' Kinley Vic' Lond' præd' execuconi brevis præd. pcedebant. Et quandam Inquisic' indent' corā eis apud Guildhall Civit' Lond' præd' scituat' in paroch' sancti Laurencij in veteri Judailmo in Warda de Cheape ejusd' Civitat' prædict' vicesimo quinto die Nov' anno regni dicti dom' Regis nunc primo supradicto p' Sac' Danielis Mann Willielm' Church Thomæ Pcunfett Johan' Phillips Georgij Gill Johan' Pope Phil' Perry Wil' Partridge Johan' Hutton Johan' Bell Johan' Dod & Georg' Knight p'borum & legal' hom' Civit' Lond' præd' Virtute brevis præd' ceper' per quam quidem Inquisic' inter al' in eadem Inquisic' content' & specificat' compert' existit quod ipse idem Lancelot' Cramlington (modo def) p' nomen Lanc' Cramlington de Villa & Com' Novi Castri super Tinam mercat' præd' 24 die tunc instant' Novembr' indebitat' fuit & ad tunc indebitat' existerat præfat' Felici Calvert in quingent' libr' legal' monet' Angl' p' tant' denar' sum' per eundem Lancelot' Cramlington (modo def.) ad opus & usum ipsius Felicis Calvert ante tunc habit' & recept'. Et quod ipse idem Lanc' Cramlington (modo def.) fecit & traxit quandam billam Excambij geren' dict' 10 die tunc instantis mensis Nov' p' præd' quingent' libr' solvend' p' quendam Will' Ryder cuidam Thomæ

Thomæ Price ad usum pd' Felicis Calvert quodque pd' sum' quingent' libr' & quælibet inde parcell' dicto die Capcon' Inquisic' præd' præd' Felici Calvert debit' existerat & insolut' Et iidem Vic' dicto die Cap' Inquisic' præd' præd' sum' quingent' libr' per ipm præd' Lanc' Cramlington præd' Felici Calvert sic ut præfertur tunc debit' & insolut' & quælibet inde parcell' necnon bill' Excambij præd' Virtute brevis præd' sibi direct' in manus dicti dom' Regis nunc capi & seifire fec' juxta exigent' ejusdem brevis Et ad diem retorn' ejusdem brevis scilicet pd' vicesimo sexto die Nov' anno regni dicti dom' Regis nunc primo supradicto p' execuc' brevis præd' Baron' præd' in Scac' præd' (eodem Scac' apud Westm' præd' tunc existen' retornaver' & certificaver' Inquisic' præd' p' ipsos in forma præd' capt' Et quod iidem Vic' prædict' sum' quingent' libr' per ipm præd' Lancelot' Cramlington præd' Felici Calvert & quælibet inde parcell' necnon billa Excambij præd' in manus dicti dom' Regis nunc capi & seifiri fec' juxta exigent' brev' præd' prout p' Record' præd' brevis de Extendi fac' & retorn' ejusdem & Inquisic' præd' eidem annex' in Scac' præd' certificat' & ibm in custod' Remem' dicti domini Regis remanen' plen' apparèt Virtute cujusquidm brevis de Extendi fac' & Inquisic' præd' superinde capt' & præd' capcon' Seifuræ præd' summæ quingent' libr' & præd' bill' Excambij pro solucon' inde sic ut præfertur fact' & tract' in manus dicti domini Regis per Vic' Lond' præd' sic ut præfertur fact' idem dominus Rex nunc ad præd' sum' quingent' libr' & præd' bill' Excambij in Inquisic' prædict' menc' p' eisdem quingent' libr' sic ut præfertur fact' & tract' legitime intitulat' fuit & existit videlicet apud Lond' præd' in paroch' & ward' præd' Et idem Lancelot' ulterius dic' quod taliter superinde in præd' Cur' Scac' dicti domini Regis nunc coram Baron' ejusdem Scac' process' fuit quod postea scilicet nono die Dec' anno regni dicti domini Regis nunc primo supradicto quoddam breve dicti domini Regis nunc de Extendi fac' è dicta Cur' Scac' dicti domini Regis nunc sub Sigillo ejusdem Cur' Vic' præd' Villæ Novi Castri super Tinam direct' pro præd' debito quingent' libr' per Inquisic' præd' sic ut præfertur compert' versus eund' Lancelot' (modo def.) debito modo emanavit Et idem Lancelot' postea & ante diem exhibic' billæ præd' prædict' Stephani & Petri scilicet decimo quinto die Jan' anno regni dicti domini Regis nunc primo supradicto apud Lond' pd' in paroch' & ward' præd' præd' sum' quingent' libr' legalis monet' Angl' ad usum dicti domini Regis nunc solvit & satisfecit in plen' exonracon' & satisfac' præd' ult' menc' brevis de Extendi fac' & præd' billæ Excambij & sum' quingent' libr' per Inquisic' præd' sic ut præfertur compert' & per Vic' Lond' præd' in manus dicti dom' Regis nunc sic ut præfertur capt' & seifit' Et idem Lancelot' ulterius in facto dic' quod ipse idm Lanc' Cramlington (modo defend.) & præd' Lanc' Cramlington in Inquisic' præd' & in prædict' ult' menc' brevi de Extendi fac' nominat' sunt una & eadē persona & non alia neque diversa Quodque præd' billa Excambij in billa prædict' præd' Petri & Stephani menc' & sum' quingent' libr' in eadem billa

The Money
seised.

The Money
and Bill of
Exchange
seised, and
returned into
the Exchequer.

The King be-
came Entitled.

An Extent
afterwards
issued out for
the levying of
the Money.

And the money
paid thereupon.

Averment of
one & eadē
persona.

Excambij

*And una &
eadem Billa.*

Excambij menē & p eandem solvi appunctuat. & præd. bill. Excambij & sum quingent libr. per Inquisic. p'd' sic ut p'fertur compert' & per Viē Lon' præd' in manus dicti domini Regis nunc sic ut præfertur capt' & seisir' & per ipsum Lanc. sic ut præfertur solut. & satisfact. fuer. & sunt una & eadem billa Excambij & una & eadem summa quingent. libr. & non alia neque diversa Et hoc parat. est verificare Unde pet' Judic' si p'd. Steph. & Petrus accon. suam p'd' inde verif. cum habere seu manutenere debeant &c.

Et una & eadem Summa.

*The Plaintiff
Demurs to the
Plea, especially.*

Et præd' Stephanus & Petrus dic' quod ipsi per aliqua per prædict. Lanc' superius placitando allegat' ab accone sua præd' inde versus ipsum Lanc. habend. præcludi non debent quia dic. quod placit. præd' per ipsum Lanc. modo & forma præd' superius in barram placit. materiaque in eodem content. minus sufficien' in lege existunt ad ipsos Steph. & Petrum ab accone præd. inde versus præd. Lanc. habend' præcludend' Quodque ipsi ad placit. illud modo & forma præd' per ipsos Lanc. super' placitat' necesse non habent nec per legem terræ tenentur respondere Et hoc parat' sunt verificare Unde p defectu sufficien' Respons' præd' Lanc. in hac parte iidem Stephanus & Petrus pet' Judic. & dampna sua occone pmissor' sibi adjudicari &c. Et pro causis moracon' in lege super placito illo iidem Steph' & Petr. secund. formam Statut' in hujusm. casu inde nuper edit. & provis. ostendunt & Cur. hic demonstrant has causas subsequen. videlicet eo quod placit. præd' tendit ad general. Exit. & est incertum in se pregnans & forinsecum & non respondit ad Narracon. & caret forma &c.

*Causas of
Demurrer.*

*Et tendit ad
Generalem
Exitum.*

*Joynder in
Demurrer.*

Et præd' Lancelot. dic. quod placitū præd' per ipsum Lanc. modo & forma præd' superius in barram placit. materiaque in eodem content. bon. & sufficien' in lege existunt ad ipsos Steph. & Petru ab accone sua prædict' inde versus ipsum Lanc. habend' præcludend' quod quidem placitum modo & forma p'd. superius in barram placitat. materiamque in eodem content. ipse idem Lanc. paratus est verificare & probare prout Cur. &c. Et quia præd' Steph' & Petrus ad placit. ill. non respondit nec ill' hucusque aliquo modo deduc. idem Lanc. ut prius pet. Judic' Et qd' præd' Steph. & Petrus ab accone sua p'd' versus eund' Lanc. habend. præcludantur &c. Et quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisatur dies inde dat' est partibus præd' coram domino Rege apud Westm. usque diem Veneris prox' post Crastinū sanctæ Trin. de Judicio suo de & super pmiss. ill' audiend. eo quod Cur. dicti domini Regis nunc hic inde nondum &c.

Continuances.

Ad quem diem coram domino Rege apud Westm' ven' tam prædict' Stephanus Evans & Petrus Pereivall qm præd' Lancelot' Cramligton per Attorn' suos prædict' Et quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. præd' reddend' nondum advisatur dies inde dat' est partibus prædict' coram eodem domino Rege apud Westm' usque diem Sabbati prox' post tres Septimanas Sancti Michaelis de Judicio suo de & super præmiss. audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem diem coram domino

*Further Con-
tinuance.*

domino Rege apud Westm' ven' tam prædict' Stephanus & Petrus
qm præd' Lancelot' per Attorn' suos præd' Et quia Cur' dicti do-
mini Regis nunc hic de Judicio suo de & super præmiss' prædict' red-
dend' nondum advisatur dies inde dat' est partibus coram eodem
domino Rege apud Westm' usque diem Lunæ prox' post Octab' sancti
Hillar' de Judicio suo de & super præmiss' præd' audiend' eo quod
Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem diem
coram domino Rege apud Westm' ven' tam præfat' Stephanus & Pe-
trus qm prædict' Lancelot' per Attorn' suos prædict' Et quia Cur'
dicti domini Regis nunc hic de Judic' suo de & super præmiss' præd'
reddend' nondum advisatur dies inde dat' est partibus præd' coram
eodem domino Rege apud Westm' usque diem Mercur' prox' post
Quinden' Paschæ de Judicio suo de & præmiss' ill' audiend' eo quod
Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem diem
coram domino Rege apud Westm' ven' tam prædict' Stephanus &
Petrus qm prædict' Lancelot' per Attorn' suos prædict' Et quia Cur'
dicti domini Regis nunc hic de Judicio suo de & super præmiss' præd'
reddend' nondum advisatur Dies inde dat' est partibus prædict' co-
ram eodem domino Rege apud Westm' prædict' usque diem Veneris
prox' post Crast' sanctæ Trinitatis de Judicio suo de & super præmiss'
audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum &c.
Ad quem diem coram domino Rege apud Westm' ven' tam prædict'
Stephanus & Petrus qm prædict' Lancelot' per Attorn' suos prædict'
Et quia Cur' dicti domini Regis nunc hic de Judicio suo de & super
præmiss' reddend' nondum advisatur dies inde dat' est partibus præ-
dict' coram eodem domino Rege apud Westm' usque diem Lunæ
prox' post tres Septimanas sancti Michaelis de Judicio suo de & super
præmiss' audiend' eo quod Cur' dicti domini Regis nunc hic inde
nondum &c. Ad quem diem coram domino Rege apud Westm' ven'
tam prædict' Stephanus & Petrus qm prædict' Lancelot' per Attorn'
suos præd' Et quia Cur' dicti domini Regis nunc hic de Judicio suo de
& super præmiss' reddend' nondum advisatur dies inde dat' est partibus præd'
coram eodem dño Rege apud Westm' præd' usque diem Lunæ prox' post
Octab' sancti Hillar' de Judicio suo de & super præmiss' audiend' eo
quod Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem
diem coram domino Rege apud Westm' ven' tam præd' Stephanus
& Petrus qm præd' Lancelot' per Attorn' suos præd' Et quia Cur'
dicti domini Regis nunc hic de Judicio suo de & super præmiss'
reddend' nondum advisatur dies inde dat' est partibus præd' coram
eodem domino Rege apud Westm' præd' usque diem Mercurij prox'
post Quinden' Paschæ de Judicio suo de & super præmiss' audiend'
eo quod Cur' dicti domini Regis nunc hic inde nondum &c. Ad
quem diem coram domino Rege apud Westm' ven' tam prædict'
Stephanus & Petrus qm præd' Lancelot' per Attorn' suos præd' Et
quia Cur' dicti domini Regis nunc hic de Judicio suo de & super
præmiss'

Further Con-
tinuance.Further Con-
tinuance.Further Con-
tinuance.Further Con-
tinuance.Further Con-
tinuance.Further Con-
tinuance.

Further Con-
tinuance.Further Con-
tinuance.Further Con-
tinuance.The *Laquila*
and Proceed-
ings revived by
Act of Parlia-
ment.
Judgment for
the Plaintiff.Writ of Inquiry
awarded.

præmiss. reddend' nondum advisatur dies inde dat' est partibus præd' coram eodem domino Rege apud Westm' usque diem Veneris prox' post Crastin' sanctæ Trinitatis de Judicio suo de & super præmiss. audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem diem coram domino Rege apud Westm' ven' tam prædict' Stephanus & Petrus qm' prædict' Lancelot' per Attorn' suos prædict'. Et quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisatur dies inde dat' est partibus prædict' coram eodem domino Rege apud Westm' usque diem Martis prox' post tres Septimanas sancti Michaelis de Judicio suo de & super præmiss. audiendo eo quod Cur' dicti domini Regis nunc hic inde nondum &c. Ad quem diem coram domino Rege apud Westm' ven' tam prædict' Stephanus & Petrus qm' prædict' Lancelot' per Attorn' suos prædict'. Et quia Cur' dicti domini Regis nunc hic de Judicio suo de & super præmiss. reddend' nondum advisatur dies inde dat' est partibus prædict' coram eodem domino Rege apud Westm' prædict' usque diem Mercurij prox' post Octab' sancti Hillar' de Judicio suo de & super præmiss. audiend' eo quod Cur' dicti domini Regis nunc hic inde nondum &c. Et modo ad hunc diem scilicet à die Paschæ in quindecim dies isto eodem Termino usque quem diem loquela prædict' (antea remanens sine die) Virtute cujusdam Actus Parliamenti confect' apud Westm' decimo tertio die Febr' anno regni domini Wilhelmi & dominæ Mariæ nunc Regis & Regina Angl' &c. primo revivificat' continuat' & adjornat' fuit coram dom' Rege & domina Regina Wilhelmo & Maria apud Westm' prædict' ven' tam præd' Steph' & Petr' qm' præd' Lancelot' p Attorn' suos præd' super quo vis' & p Cur' dictor' domini Regis & dominæ Reginae nunc hic plenius intellectis omnibus & singulis præmiss. maturaque deliberacon' superinde habita videtur eidem Cur' quod placitum præd' per ipsum Lancelot' modo & forma prædict' superius in Barr' placitatur materiaque in eodem content' minus sufficien' in lege existunt ad ipsos Stephanum & Petrum ab accone sua prædict' inde versus prædict' Lancelot' habend' præcludend'. Ob quod iidem Stephanus & Petrus dampna sua versus prælat' Lancelot' occasione præmissorum recuperare debeant. Sed quia Cur' dictorum domini Regis & dominæ Reginae nunc hic incognit' existit quæ dampna iidem Stephanus & Petrus tam occasione præmissorum præd' qm' pro mis' & custag' suis per ipsos circa sectam suam in hac parte apposit' sustinuer' Ideo præcept' est Vic' London' prædict' quod per Sacrum' proborum & legalium hominum de Balliva sua diligent' inquir' quæ dampna iidem Stephanus & Petrus tam occasione præmissorum prædict' qm' pro mis' & custag' suis per ipsos circa sectam suam in hac parte apposit' sustinuer' & Inquisicon' qm' &c. domino Regi & dominæ Reginae apud Westm' prædict' die Veneris prox' post Crastin' sanctæ Trinitatis sub Sigill' &c. & Sigill' &c. mittant una cum Brevis dicti domini Regis &c.

& dominæ Reginæ eis inde direct. Idem diēs est præfat^{us} Stephano & Petro ibidem &c. Ad quem diem coram domino Rege & domina Regina apud Westm^{onasterium} prædict^{us} ven^{erunt} præd^{icti} Stephanus & Petrus per Attorn^{os} suum præd^{ictum} Et Vic^{us} London^{is} præd^{ictus} (videlicet) Johannes Fleet Mil^{ites} & Humfrid^{us} Edwin Mil^{ites} retorn^{erunt} quandam Inquisicon^{em} coram eis vicesimo quarto die Maij anno regni domini Willielmi & dominæ Mariæ nunc Regis & Reginæ Angl^{ie} &c. primo apud Guild Hall scituat^{us} in paroch^{ia} sancti Laurencij in Veteri Judaismo in Warda de Cheape ejusdem Civitat^{is} Virtute Brevis prædict^{us} cap^{itulum} per Sacrum duodecim proborum & legalium hominum de Balliva præfat^{us} Vic^{us} per quam compert^{um} exist^{it} quod prædict^{us} Stephanus & Petrus sustinuer^{unt} dampna occasione præmissorum præd^{ictorum} ultra mis^{is} & custag^{is} sua per ipsos circa sectam suam in hac parte apposit^{am} ad sexcent^{os} libr^{os} & pro mis^{is} & custag^{is} ill^{orum} ad vigint^{os} sex solid^{os} & octo denar^{os}. Ideo cons^{ideratus} est quod præd^{icti} Stephanus & Petrus recuperent versus præfat^{um} Lancelot^{um} dampna præd^{ictorum} per Inquisicon^{em} præd^{ictam} superius in forma præd^{ictæ} compert^{um} necnon trigint^{os} & sex libr^{os} tresdecim solid^{os} & quatuor denar^{os} pro mis^{is} & custag^{is} suis præd^{ictorum} eidem Stephano & Petro per Cur^{iam} dictorum domini Regis & dominæ Reginæ nunc hic ex assensu suo de Incrō adjudicat^{ur}. Quæ quidem dampna in toto se attingunt ad sexcent^{os} trigint^{os} & octo libr^{os}. Et præd^{ictus} Lancelot^{us} in misericordia &c. Judic^{atus} sign^{atus} sexto die Junij MDCLXXXIX. General Errois assigned.

The Inquisi-
on returned.

Damages
found.
Judgment for
the Plaintiff.

Cramlington versus Evans and Percival.

In a Writ of Error upon a Judgment in the Kings Bench, wherē Evans and Percival declared against the Defendant in an Action upon the Case, that in the Realm of England (viz.) in the Parish of St. Mary le Bow, London, there is and hath been time out of mind a Custom amongst Merchants and other persons, (viz.) That if a Merchant, or other person, makes a Bill of Exchange according to the Usage of the Merchants, directed to a Merchant or other person resident in England, requesting the person to whom directed to pay the Sum of Money in the Bill mentioned, at the time therein limited, to the person in the Bill named or his Order, for the use of any other person in such Bill mentioned, for the value received of the person mentioned in such Bill, and to place it to account as by advice; and if the person to whom such Bill is directed, accepts it according to the Usage of Merchants; and if that person who in such Bill is appointed to receive such Money by an Indorsement upon the said Bill, orders the payment of such Money to any other person or persons, or their Order, for the value in the Indorsement mentioned, to have been received of the person named in such Indorsement; if he that accepted such

R t 2

Bill

Bill both afterwards refuse to pay it to him named in the said Indorsement, then he which made and directed the Bill, upon Notice of such Refusal, is chargeable to pay the Money to the person, or his Order, to whom by the Indorsement it was appointed to be paid.

Then they say, That Cramlington the 10th day of November, Anno Domini 1685. at Newcastle, directed a Bill of Exchange of the same Date to one William Ryder, requesting him at 25 Days after the Date of the said Bill, to pay to Thomas Price, or his Order, 500 l. for the use of Felix Calvert Esq; for the value received of Francis Clever, and to place it to account prout per advisamentum; and on the 14th of the said November it was shewn to the said Ryder, who then (according to the Usage of Merchants) accepted it; and that the said Price upon the said 14th day of November, for the value received of them the said Evans and Percival, by an Indorsement upon the said Bill, according to the Usage of Merchants, ordered the Contents thereof to be paid to the said Evans and Percival; and that the said Ryder afterwards (viz.) the 5th day of December, in the year aforesaid, was requested by them the said Evans and Percival to pay to them the said Money according to the aforesaid Indorsement, and the said Ryder refused to pay it.

Of all which the said Cramlington had Notice, (viz.) upon the 1st day of January in the same year, and by reason thereof, and of the Custom aforesaid, he became charged with the payment of the said Money to them the said Evans and Percival; and thereupon the said Cramlington in consideratione præmissorum, did promise to pay the said 500 l. to the said Evans and Percival, &c. but not minding his Promise, had not paid the said Money licet scilicet requisitus, &c.

To this the Defendant Cramlington puts in a Plea in Bar to the effect as followeth; (viz.) Protestando, that there was no such Custom as set forth in the Declaration pro placito dicit, that long before the Action brought, Felix Calvert in the Declaration mentioned, was one of the Commissioners of Excise; and upon the 10th of November, Anno primo Domini Regis nunc, by the hands of Clever in the Declaration mentioned, did pay 500 l. of the Money arising to his Majesty upon the Duty of Excise; and at the Request of the said Calvert, the Defendant upon the same 10th of November, made and directed the aforesaid Bill of Exchange to the said William Ryder, to pay to the said Price 500 l. for the use of the said Calvert, as in the Declaration is set forth.

And he further saith, That the said Calvert, upon the 24th day of the said November, was indebted to the King upon the Account aforesaid in 5000 l. and upwards, prout per Recordum Scaccar', &c. & superinde taliter processum fuit in Cur' Scaccar' prædict'; that upon

upon the 24th of November aforesaid a Writ of *Extendi facias* was awarded to the Sheriffs of London against the said Calvert for the said Debt of 5000 l. commanding him to Enquire per *Sacramentum proborum & legalium hominum*, &c. what Goods, Chattels, Debts, Specialties, Sums of Money, &c. the said Calvert then had, and to extend and seise them into the Kings hands, in whose hands soever they then were, that the King might be thereout satisfied of the said Debt *juxta formam Statuti pro hujusmodi deb' dicti domini Regis recuperand'*; Which Writ was Returnable the 26th of the said November, and upon the 24th was delivered to the then Sheriffs of London; who upon the 25th day of the said November, by virtue of the said Writ, took an Inquisition per *Sacramentum*, &c. by which it was found that the said Defendant Cramlington, upon the 24th of the said November, was indebted to the said Calvert in 500 l. for Money received by him to the use of the said Calvert; and that the Defendant made a Bill of Exchange, dated the 10th of the said November, directed to the said Ryder, to pay to the said Price, to the use of the said Calvert the Sum of 500 l. and that the same was due to the said Calvert at the time of the Inquisition taken; and that the said Sheriffs did thereupon seise the Debt and Bill of Exchange into the Kings hands *secundum exigentiam brevis predict'*, and Returned the said Writ and Inquisition, &c. into the Exchequer prout per Recordum, &c. plenius apparet; by virtue of which the King became lawfully entitled to the said 500 l. and Bill of Exchange aforesaid.

And the Defendant further saith, That afterwards (scilicet) the 9th of December, Anno primo, &c. a Writ of *Extendi facias* was awarded out of the said Court of Exchequer against the said Defendant Cramlington for the said 500 l. and thereupon he paid the said 500 l. upon the 15th day of January Anno primo supradicto, to the use of the King in plena exoneracione & satisfactione predict' ult' mentionat' brevis de *extendi fac'* & predict' Bill' excambij & & summe quingent' librarum per Inquisitionem predict' sic ut praeterius compertum, &c. and concludes with Averments, (viz.) That he the Defendant Cramlington is the same so named with him in the Extent, and that the 500 l. the Bill of Exchange, &c. in the Inquisition found are the same with them mentioned in the Declaration, &c. and so demands Judgment of the Action.

To this Plea the Plaintiffs Demurred.

And after divers Arguments Judgment was given in the Kings-Bench for the Plaintiffs in Easter Term, in the first year of King William and Queen Mary.

And now it came to be Argued upon a Writ of Error in the Exchequer Chamber.

First,

First, It was alledged for Error, that the Custom is laid to general, (viz.) not only to extend to Merchants, but all others; so that it must be at the Common Law if to be allowed at all.

Sed non allocatur: For in the Case of Sarsfield and Witherly, (lately Adjudged) it was Resolved, That a person, not being a Merchant, drawing a Bill of Exchange, was bound according to the Usage of it amongst Merchants, and in Declarations upon Bills of Exchange, the whole Matter is to be set forth specially.

Secondly, There was (as appears by the Bill of Exchange) 25 Day given for the payment of it after the Date of the Bill; whereas here the Request and Refusal is upon the 25th day after the Date.

Sed non allocatur: For as the Bill is set forth, it is to pay the Money ad viginti & quinque dies post datum; and this can't be, if not paid at the five and twentieth day.

Thirdly, The Matter chiefly insisted upon for Error was, That the 500 l. was appointed to be paid to Price for the use of Calvert, so the right and interest of the Money was in Calvert, by whomsoever it should be received, and then it might well be seized for the Debt which Calvert did owe to the King.

But the Court held, that the Seizure for the King ought not to have been in this case.

1. For that tho' it were to be paid for Calvert's use, yet this was but a Trust, and the Right of the Money was in Price. As if Goods be given to A. to the use of B. the property of the Goods is in A. Otherwise, if Money be delivered to A. to pay to B. there the Right of the Money is in B. and he may bring an Action of Debt.

2. Here the Bill is Endorsed over to be paid to the Plaintiffs before any Seizure, or the Writ of Extent was issued forth, and the Custom is expressly laid, that an Endorsement might be as in the Case here; which Custom is confessed, and that determines the Right and Interest in the Money of him that makes the Endorsement, and puts it in the Plaintiffs.

Wherefore the Judgment was affirmed.

Termino Sanctæ Trinitatis Anno 2 W. & M.

In Scaccario.

Burchett versus Durdant.

In a Writ of Error upon a Judgment in an Ejectment in the Kings-Bench, where the Plaintiff Mary Durdant declared upon the Demise of William Durdant of two Messuages, 100 Acres of Land, &c. in Chobham, in the County of Surrey.

Upon Not guilty the Jury gave a Special Verdict, That Henry Wicks was seised in fee of the Premises, and by his Will in writing, dated the 6th of June 1657. he Devised in the words following: (Viz.) I give to my Cousin John Higden and his Heirs, during the Life only of Robert Durdant my Kinsman, all those my Messuages, &c. in Chobham in the County of Surrey; upon this Trust and Confidence, That he the said John Higden and his Heirs, shall permit and suffer the said Robert Durdant, during his Life, to have and receive the Rents and Profits thereof, which shall yearly grow due and payable, he the said Robert committing no Waste. And from and after the Decease of Robert Durdant, then do I give the said Lands and Premises in Chobham unto the Heirs Males of the Body of him the said Robert Durdant now living, and to such other Heirs Male and Female as he shall hereafter happen to have of his Body; and for want of such Heirs, then to the use and behoof of my Cousin Gideon Durdant and the Heirs of his Body; and for want of such Heirs, the same to be and remain to the right Heirs of me the said Henry Wicks.

They find that Wicks died the 2d of December 14 Car. 2. seised, as aforesaid, and that John Higden entered and was seised prout lex postulat, and by Deed bearing date the 1st of Jan. 14 Car. 2. reciting the said Will, and that the said Robert Durdant and Gideon Durdant had Contracted with the said John Higden for the sale of the said Messuages, Lands and Premises: And to the intent, that the Contingent Remainder by the said Will limited to the Heirs Males and Females of the Body of the said Robert Durdant might be extinguished and destroyed; he the said John Higden, by the appointment of the said Robert Durdant, did surrender his Estate in the Premises to the said Gideon Durdant; and by the said Deed it was Covenanted, That the said Robert Durdant

Durdant, John Higden and Gideon Durdant should levy a fine of the Premises, which should be to the use of the said John Higden and his Heirs.

They find that a fine was levied accordingly in Easter Term, 15 Car. 2.

They find, That Robert Durdant died on the 19th of August, 20 Car. 2. and that John Higden after in 20 Car. 2. upon a valuable Consideration in money, enfeoffed John Burchet of the Premises; and that the said Burchet died the 1st day of October in the same year, and that the Premises from him came to the Defendant Burchet, who entered into the Premises and became seised prout lex postulat.

And they find, That Robert Durdant as well at the time of the said Will making, as at the death of the said Henry Wicks, had an only Son called George Durdant, who was also Godson to the Testator; and that the said George Durdant died, and that William Durdant (Lessor of the Plaintiff) was his Son and Heir, and entered, and made the Demise prout, &c. & si super totam materiam, &c.

Upon this Special Verdict Judgment was given in the Kings Bench for the Plaintiff.

And the Court here afterwards having heard the Case thrice Argued, did affirm the Judgment.

And the first Point spoken to was, Whether the Estate did not execute in Robert Durdant by the Statute of 27 H. 8. of Uses, for if so, he would be seised of an Estate tail, and then Burchet would have a good Title.

It is clear, Lands may be Devised to the use of another, as in Popham 4.

It is true, a Devise implies a Consideration, and will lodge the Estate in the Devisee, if no Use be limited upon it.

Here it is Devised to John Higden and his Heirs, upon trust and confidence that he should permit and suffer, &c. The word Trust is proper for the Limitation of an Use, and the Estate shall execute unless it be first limited to the use of a man and his Heirs in Trust for another, there the Intention is, that it should be only a Trust; and here Robert Durdant is restrained only from doing waste, which shews, that he intended he should take an Estate, or else he could not commit waste.

The Court over-ruled this Point, and Resolved it to be only a Trust in Robert Durdant; for the words are, That Higden should permit him to take the profits, which shews that the Estate was to remain in Higden; And for the restraint of waste it was proper; for Higden was to permit Robert Durdant to have the possession; but the Testator would not have him to commit waste or spoil.

But Lands may be Devised to an Use, tho' the Statute of Wills is since the Statute of Uses, Mo. 107. 1 Cro. 343.

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The second and principal Point was, Whether the Remainder to the Heirs of Robert Durdant, now living, did vest in George Durdant, or was a Contingent Remainder.

It was much urged, That one could not take in the Life of his Ancestor by the name of Heir; for *nemo est hæres viventis*, in the 1 Co. Archer's Case. A Devise to Robert, Remainder to the next heir Male of Robert, and to the heirs Males of the Body of that heir Male, this is Resolved to be a Contingent Remainder during the Life of Robert; and it was said in that Case, that the next heir Male is as much a designation of a person, as an Heir now living. He that will take by purchase by the name of Heir, must be a compleat Heir to all intents, Co. Litt. 24. b. 2 Leon. 70. Chalonier and Bowyer's Case upon a Devise.

But it was Resolved, that this was a Remainder vested in George Durdant; for the Remainder being limited to the Heirs of the Body of Robert Durdant, now living, and George being found to be then the only Son, it was a sufficient designation of the person, and as much as if it had been said, to his Heir apparent; and such an one is called Heir sometimes in proceedings in Law, where the greatest strictness of phrase is used; as in Writs of Ravishment of Ward, *Quare filium & hæredem rapuit*, 2 Inst. 439. Westm. 2. cap. 35. 25 Ed. 3. the Statute of Treasons, Treason to kill the Heir of the King.

The third Point was, Whether George Durdant took an Estate Tail, or only an Estate for Life; for it was Objected, that if the words (Heirs of the Body) were taken for the description only of the person who should take, then he must take only for Life.

But the Court held, that they would make an Estate Tail; for Heirs is *nomen collectivum*, and is sometimes so taken when 'tis only Heir in the Singular Number. A Devise to one for life, Remainder to the heir Males of his Body for ever; this is an Estate Tail in the Devisee, Pawley and Lowther, in Rol. Abr. 2. Part 253. But in case the first words, (viz.) Heirs of the Body now living, would carry but an Estate for Life to George Durdant; yet the subsequent words would make an Entail in him, (viz.) and to such other Heirs, Male and Female, as he should hereafter happen to have of his Body, this would clearly vest an Entail in George, he being Heir of the Body of Robert, and surviving Robert. So the Judgment was affirmed.

Sed Nota as to the second Point, the Lord Chief Baron Arkyns and Justice Powell seemed to be of Opinion, that the Remainder was Contingent: But in regard the Point had been upon a Writ of Error brought in the House of Lords upon a Judgment given in the Kings-Bench in another Case, upon the same Will, adjudged to be a Remainder vested, they conceived themselves bound by that Judgment in the House of Lords.

Pascha, Anno 2 Willielmi & Mariae.

Memorandum.

By an Order of the King and Council, 1 Willielmi & Mariae, the Judges were Ordered to meet; and all of them (except Gregory, Eyre and Turton) were assembled at the Lord Chief Justice's Chamber, to give their Opinion concerning Colonel Lundy, who was appointed Governour of London Derry in Ireland by the King and Queen, and had endeavoured to betray it; and afterwards he escaped into Scotland, where he was taken and brought Prisoner into England, and Committed to the Tower.

Whether admitting he were guilty of a Capital Crime by Martial Law, committed in Ireland, he might be sent thither from hence to be Tryed there, in regard of the Act of Habeas Corpus made Anno 31 Car.2. which Enacts, That no Subject of this Realm shall be sent over Prisoner to any Foreign parts: But then it has a Proviso, That if any Subject of this Realm has committed any Capital Crime in Scotland, or other Foreign parts of the King's Dominions, he may be sent from hence to be Tryed in such Foreign place.

Upon Consideration of which Proviso the Judges unanimously gave their Opinion, That there was nothing in the Habeas Corpus Act (supposing he had committed a Capital Crime by Law Martial in Ireland) to hinder his being sent thither to be tryed thereupon; and subscribed their Names to the said Opinion, and certified the same to the Privy Council.

Note, That it was said; (while my Lord Hale was Chief Justice of the King-Bench) that one—who had committed Murder in the Barbadoes and taken here, was sent over to be Tryed there: But was before the Habeas Corpus Act.

Patrick

Patrick Harding's Case.

HE was Indicted at the Sessions in the Old Baily (Anno primo Willielmi & Mariæ) for High Treason.

The Indictment sets forth, that the said Patrick Harding machinans & proditorie intendens pacem & communem tranquillitatem hujus regni Angl' destruere & Gubernationem dictorum domini Regis & dominæ Reginæ infra hoc regnum Angl' subvertere ac exedes destructiones & desolationes infra hoc regnum procurare 23 Novembr' anno regni domini nostri Willielmi & Mariæ, &c. primo apud paroch' sancti Martini in Campis in Com' Middlesex' prædict' malitiose & proditorie compassavit imaginat' fuit & intendebat dict' dom' Regem & dom' Reginam adtunc supremos veros & indub' dom' suos non solum à statu titulo potestate imperio & regimine regni sui Angl' penitus deponere & deprivare verum etiam eisdem dom' Regem & dom' Reginam interficere & ad mortem & finalem destructionem ponere & adducere & stragem miserabilem inter subditos per totum hoc regnum & alia Dominia sua causare quodque ipse prædict' Patrick Harding ad nequissimas proditones & proditiosas intentiones suas prædict' perimplend' eodem vicefimo tertio die Novembr' apud paroch' prædict' proditorie vi & armis, &c. bellum & rebellionem contra dictos dom' Regem & dom' Reginam nunc ordinavit levavit & gerebat ac diversos milites & viros armatos & armaturos ad mil' ac bellum contra dictos Regem & Reginam nunc gerend' congregavit levavit & procuravit ac viros & milites sic ut præfertur levat' extra hoc regnum Angl' misit & iter suam suscipere procuravit ad sese jungend' aliis hostibus inimicis & rebellionibus dictorum Regis & Reginæ & bellum contra eosdem gerend' & ulterius quod ipse Patricius Harding ad nequissimas suas proditones perimplend' & perficiend' eodem 23 Novembr' apud paroch' prædict' ut falsissimus proditor dictor' Regis & Regin' cum quodam Johanne Taaf adtunc subdito dictor' Regis & Reginæ existen' proditorie se assembl' & consultavit ac easdem proditones suas præd' adtunc & ibid' eidem Johanni Taaff malitiose proditorie & advisat' loquend' in auditu divers. subditor' dictor' Regis & Reginæ publicavit & declaravit ad suadend' eundem Johannem Taaff adjutan' & assisten' esse in iisdem proditionibus magnum præmium & stipend' eidem Johanni Taaff adtunc & ibidem obtulit Si ipse præd' Johannes Taaff adjutans & assistens in iisdem esse vellet contra ligeantiz suæ debitum & contra pacem dictor' dom' Regis & dom' Regin' nunc coron' & dignitat' suas necnon contra formam Statut' in hujusmodi casu edit' & provis' &c.

Upon Not guilty pleaded the Jury found a Special Verdict, (Viz.)

That Patrick Harding, to the intent to Depose the King and Queen, and deprive them of their Royal Dignity, and restore the late King James to the Government of this Kingdom, did (for Money by the said Patrick paid) list, hire, raise and procure Sixteen men, Subjects of this Kingdom, at the time and place in the Indictment mentioned, to fight and wage war against the King and Queen; and those Sixteen men so listed, hired, raised and procured, did send out of this Kingdom into the Kingdom of France to assist and aid the French King, then and yet an Enemy to the King and Queen, and in open war with Their Majesties, and to joyn themselves with the Enemies and Rebels of and against the King and Queen in waging war against the King and Queen: And if upon this matter the said Patrick Harding be guilty of Treason prout the Indictment, then we find him Guilty prout &c. and if Not guilty, &c. then not Guilty, &c.

Upon this Special Verdict found, the Lord Chief Justice, Justice Gregory and Justice Ventris, who were then present at the Sessions, conceived some Doubt; for they were of Opinion, that it did not come within the Clause of the Statute of 25 Ed. 3. of Levying War: For that Clause is, That if a man levy War against our Sovereign Lord the King *in his Realm*; and by the Matter found in the Special Verdict it appears, that these Men were listed and sent beyond Sea to aid the French King.

It was also Doubted, whether it were a good Indictment within the Clause of the Statute of adhering to the King's Enemies. the fact found in the Verdict comes fully within that Clause, (viz.) the sending Men to aid the French King, then an Enemy to the King and Queen in open War against them. But the Indictment is short as to this matter; for 'tis quod milites sic ut præfertur levatos extra hoc regnum Angl' misit ad sese jungend' aliis hostibus inimicis & rebellat' dict' Regis & Regin'; whereas it should set forth who the Enemies were, that the Court might take notice whether they were Enemies as the Law intends. If the Indictment had been That he sent them to the French King, then in open War, &c. it had been well.

33 H.6.1.b.

And upon these Doubts the Case was Adjourned for further Consideration.

In Michaelmas's Vacation the greater part of the Judges were assembled at the Lord Chief Justices Chamber, and having debated the Matter amongst themselves, they all (except Justice Dolben) agreed, that the said Patrick Harding was guilty of High Treason within the Clause of the Statute, for Compassing the Death of the King, it being found by the Verdict, That the said Patrick Harding, to the intent to depose the King and Queen, and

deprive

deprive them of their Dignity, &c. did for Honey, hire, list, &c. and an intent to Depose the King (proved by an Overt act) hath been always taken to be within the Clause of Compassing the Death of the King. So is Hales's Pleas of the Crown, fo. 11. and so it was held in the Case of the Earl of Essex in Queen Elizabeth's Time, and in the Lord Cobham's Case in the Reign of King James the first.

And the Chief Justice cited the Statute made 29 H. 6. cap. 1. upon the Rebellion of Jack Cade; which Act sets forth, that John Cade, naming himself John Mortimer, falsely and traitterously imagined the Death of the King, and the destruction and subversion of this Realm, in gathering together and levying of a great Number of the King's People, and exciting them to Rise against the King, &c. against the Royal Crown and Dignity of the King; was an Overt act of imagining the Death of the King, and made and levied War falsely and traitterously against the King and his Highness, &c. So that it appears by that Act, that it was the Judgment of the Parliament, That gathering Men together, and exciting them to Rise against the King, was an Overt Act of Imagining the Death of the King. Vide Stamford's Pleas of the Crown, fo. 180.

And according to this Opinion Judgment was given against Harding in the following Sessions, and he was Executed thereupon.

NOta, At an Adjourned Sessions held the 19th of May, 2 Wilhelmi & Mariae, it appeared, that One of the Kings Witnesses which was to be produced in an Indictment for Treason, had been the day before Challenged to fight by a Gentleman, (that, it was said was a Member of the House of Commons), he was by the Court bound in a Recognizance of 500 l. to keep the Peace. And because it appeared the Witness had accepted the Challenge, he was bound in the like Sum.

NOta, Upon an Appeal to the House of Lords (Anno 2 Wilhelmi & Mariae) the sole Question was, Whether upon the Statute of Distributions, 22 & 23 Car. 2. the half Blood should have an equal share with the whole Blood of the Personal Estate? And by the Advice of the two Chief Justices, and some other of the Judges, the Decree of the Lords was, That the Half Blood should have an Equal share.

Samon *versus* Jones.

IN an Ejectment brought in the Court of Exchequer, in the—
year of the Reign of the late King James the Second.

The Case upon a Special Verdict was to this effect; William Lewis, seised of a Reversion in fee expectant upon an Estate for Life, did by Deed Poll, in Consideration of Natural love and affection which he had to his Wife, and Robert Lewis his Son and Heir apparent, begotten on the Body of his said Wife, and to Ellen his Daughter, give, grant and confirm unto the said Robert Lewis the Son, all those Lands, &c. the Reversion and Reversions, Remainder and Remainders thereof, To have and to hold to his Son and his Heirs to the Uses following, (viz.) to the use of himself for Life, (and then mentioned several other Uses not necessary to be here mentioned, as not material to the Point in question) and then to the use of the Wife for Life, and after to the use of Robert and the Heirs of his Body; and for want of such Issue to the use of Ellen the Daughter, and the Heirs of her Body, &c. William Lewis and his Wife died; Robert the Son devised the Estate to the Lessor of the Plaintiff, and died without Issue; Ellen was in possession, and claimed the Lands by this Deed, in which there was a Warranty, but no Execution of the said Deed (further than the Sealing and Delivery) was had, either by Enrolment, Attornment, or otherwise.

So that the sole Question was, Whether this Deed should operate as a Covenant to stand seised, or be void? And it was Adjudged to amount to a Covenant to stand seised in the Court of the Exchequer.

And upon a Writ of Error brought upon the Statute of Ed. 3. before the Commissioners of the Great Seal, and others empowered by that Act to sit upon Writs of Error, of Judgments given in the Court of Exchequer, the said Judgment was Reversed by the Opinion of Holt Chief Justice of the Kings Bench, and Pollexfen Chief Justice of the Common-Pleas.

And upon a Writ of Error before the Lords in Parliament, brought upon the said last Judgment, it was Argued for the Plaintiff in the Writ of Error, That this should enure as a Covenant to stand seised to the use of the Wife, Son, &c.

It appears by Bedell's Case in the 7 Co. and Foxe's Case in the 8 Co. that the words proper to a Conveyance are not necessary; but ut res magis valeat a Conveyance may work as a Bargain and Sale, tho' the words be not used so as a Covenant to stand seised, tho' the word Covenant is not in the Deed, and—and Poplewell's Case were

were cited in 2 Roll. Abr. 786, 787. A Feme in Consideration of a Marriage intended to be had between her and J. S. did give, grant and confirm Lands to J. S. and his Heirs, with a Clause of VVaranty in the Deed, which was also Enrolled, but no Livery was made: It was Resolved to operate as a Covenant to stand seised; (Vide Osborn and Churchman's Case in the 2 Cro. 127. which seems contrary to that Case) but the chiefest Case relied upon was that of Crossing and Scudamore, Mod. Rep. 175. where a man by Indenture bargained, sold, enfeoffed and confirmed certain Lands to his Daughter and her Heirs, and no Consideration of Natural Love or Money exprest: This was Resolved 22 Car. 2. in B.R. to operate as a Covenant to stand seised; and upon a Writ of Error in the Exchequer Chamber, the Judgment was affirmed.

It was said on the other side for the Defendant, That the Case at Bar differed from the Cases cited; for here the Intention of the Deed is to transfer the Estate to the Son, and that the Uses should arise out of such Estate so transferred. In the Cases cited no Uses are limited upon the Estate purposed or intended to be Conveyed; but only an Intention appearing, to convey an Estate to the Daughter in Crossing's Case, and to the intended Husband in Poplewell's Case; and seeing for want of due Execution in those Cases the Estate could not pass at Law, it shall pass by raising of an Use. But the Case at Bar is much the same with the Case of Hore and Dix in Siderfin the 1st Part. 25. where one by Indenture between him and his Son of the one part, and two Strangers of the other part, in Consideration of Natural love, did give, grant and enfeoff the two Strangers to the use of himself for Life, Remainder to the Son in Tail, &c. and no other Execution was there than the Sealing and Delivery of the Deed; this was Resolved not to raise an Use, for the Use was limited to rise out of the Seisin of the Strangers, who took no Estate. Vide Pitfield and Pierce's Case 15 Car. 1. Marche's Rep. 50. One gave, granted and confirmed Lands to his Son after his Death; this Deed had been void, if Livery had been made: It was Resolved not to enure as a Covenant to stand seised, because the Deed was void in the frame of it.

The Lords affirmed the last Judgment given by the Lords Commissioners, &c. and held that no Use would arise.

With the concurrent Opinion of Baron Nevil, Justice Eyre, and Justice Ventris.

T H E

T H E
ARGUMENT
 O F
Mr. Justice Ventris
 I N T H E
EXCHEQUER-CHAMBER,
 U P O N A
 Writ of ERROR out of the *Kings-Bench.*

} Christopher Dighton Gent. Plaintiff
versus
 } Bernard Greenvil Esq; Defendant.

TH E Plaintiff brought a Writ of Error upon a Judgment, in an Action of Trespass and Ejectment in the Kings-Bench given for the Defendant, where the Plaintiff declared upon the Demise of Theophilus Earl of Huntingdon, of a Moiety of the Mannor of Marre, and of divers Messuages, Lands and Tenements lying in Marre Bentley in Baln in the County of York, and also of the Demise of Robert Earl of Scarisdale, of the other Moiety of the said Mannor, and of the Demise of Elizabeth Lewis, of the entire Mannor of Marre, and that by Vertue of these several Demises he entred; and was possessed until ejected by the Defendant.

Upon Not Guilty pleaded, the Jury found the Defendant Not Guilty of the Trespass and Ejectment upon the Demise of Elizabeth Lewis, and as to the Demises of the several Moieties by the said Earls, they found a Special Verdict to this effect, (Viz.)

E t

That

That Thomas Lewis the 9 of April, 20 Jac. 1. befoze the Mayor of Lincoln, acknowledged a Statute Merchant to William Knight for 1200 l. to be paid at the Feast of St. Philip and Jacob then next following, and that the said Money was not paid at the day, and that William Knight the 16 of November 1629. made his last Will, and one Isaac Knight his Executor, and died, that Isaac proved the said Will, and in Trinity Term 20 Car. 1. sued a Cap. si laicus out of the Common-Pleas against the said Thomas Lewis, directed to the Sheriff of Lincoln, returnable in Tres Trin. who returned quod laicus suit sed non suit inventus in balliva sua, upon which issued a Writ bearing Teste the 7 of July, 23 Car. 1. Vie Eborum, to extend the Goods and Chattels, and all the Lands and Tenements of the said Thomas Lewis, tempore Recognitionis debiti præd' returnable Mensē Michael. upon which the said Sheriff returns an Inquisition taken the 11 of October then next following; whereby Thomas Lewis was found seised of divers Lands and Tenements, parcel of the Lands in the Declaration mentioned to be devised by the said Earls, which he the same day caused to be delivered to the said Isaac, to hold by Extent as his free-hold, until he should be satisfied of his said Debt, with his Damages and Costs.

They further find, That the said Thomas Lewis, and one John Lever, and Thomas Lever the 20 of Novemb. 13 Car. 1. acknowledged a Recognizance in nature of a Statute Staple, befoze the Lord Chief Justice Brampton, to Richard Gerrard for 1000 l. payable at Christmas then next following, which Money was not paid at the day, and that upon a Certificate of the said Recognizance in the Chancery by John Gerrard, surviving Executor of Richard Gerrard the 22 of June, 24 Car. 1. there issued a Cap. si laicus, and an Extent against the said Thomas Lewis, to the Sheriff of the County of York, returnable in Crast. animar' prox' at which day the Sheriff returned an Inquisition by him taken; whereby it appeared, that the said William Lewis tempore Recognitionis debiti præd' was seised in Fee of the Mannor of Marre, and of divers Messuages, Lands and Tenements, being the same Lands in the Declaration mentioned, to be devised by the said Earls; and the 29 of Novemb. 24. Car. 1. a Liberate was sued out returnable in quinden' Hillar' to the said Sheriff who returned, that the 29 of Novemb. 24. Car. 1. he had caused to be delivered the said Mannor, Messuages, Lands and Tenements to the said John Gerrard, to hold as his free hold, until he should be satisfied his said Debt, with his Damages and Costs.

They further find, That Thomas Lewis, and Thomas Lever the 27 of May, 15 Car. 1. acknowledged a Recognizance in nature of a Statute Staple, befoze the Lord Chief Justice Brampton, to Sir Gervase Elwaies, and William Burroughs for 5000 l. payable at the

the Feast of St. John the Baptist next following, which Money was not paid at the day, and that upon a Certificate of the said Recognizance in Chancery, by the said Sir Gervase Elwaies and William Burroughs, the 10 of Decemb. 15 Car. 1. there issued out a Cap. si laicus, and an Exigent against the said Thomas Lewis, directed to the Sheriff of the County of York, returnable in Quiden' Hill. prox. at which day the Sheriff returned an Inquisition by him taken; whereby it appeared, that the said William Lewis tempore Recogn' debiti præd' was seised in Fee of a Capital Messuage in Marre, and of divers Messuages, Lands and Tenements, being the same Lands mentioned in the Declaration, to be demised by the said Earls; and that the 10 of Febr. 15 Car. 1. a Liberate was sued out returnable in Quiden' Pasch. to the said Sheriff, who returned, that he had caused to be delivered the said Lands and Tenements to the said Sir Gervase Elwaies, and William Burroughs, to hold as their Free hold, until they should be satisfied, the said Debt with their Damages and Costs.

They find that Thomas Lewis was seised of all the Lands mentioned in the said several Inquisitions, at the respective times of his acknowledgment of the said Statute and Recognizance.

They find that the 15 of July 1651. Isaac Knight, and John Gerrard, by their respective Deeds granted their said several extended interests to one Edward Lewis; by vertue whereof the said Edward Lewis became possessed of the Mannor and Tenements, & præd. Edwardo sic possessionat existente, prædictoque Thoma Lewis de Manerio & omnib' premissis seisc' existen' & in actual. & reali possessione inde; the said Thomas Lewis, by his Indenture of Lease and Release, dated the 25 and 26 of May 1657. for 4000 l. conveyed the said Mannor and Premises to John Lewis and his Heirs, in which there is a Covenant to Levy a fine, before the end of Trinity Term then next ensuing, and that accordingly in Trinity Term 1657. The said Thomas Lewis did Levy a fine come ceo, with Proclamations of the said Mannor and Premises to the said John Lewis, to the uses in the said Indenture mentioned, by vertue whereof the said John Lewis was seised in Fee of the said Mannor and Premises: And that John Lewis being thereof so seised the 21 day of July 1670, made his last Will and Testament in Writing, and thereby devised the said Mannor and Tenements to Edward Lewis, and the Heirs Males of his Body, and for want of such Issue to his Daughters, Elizabeth and Mary, and the Heirs of their Bodies lawfully Issuing, and for want of such Issue to his own right Heirs; and that John Lewis the 1 of August 1671 died so seised, and that the said Mannor and Premises, at the time of making of the said Will, were in the possession of the said Edward Lewis; and that by vertue thereof,

the said Edward Lewis became seised of the said Mannor and Premises prout lex postulat, and that in Michaelmas Term 23 Car. 2. the said Edward Lewis being so seised levied a fine come ceo, with Proclamations of the said Mannor and Premises to Francis and his Heirs, to the use of Edward Lewis and his Heirs.

They find that John Lewis had Issue two Daughters, Elizabeth and Mary, who were the Heirs both of John and Edward Lewis; and that Edward Lewis 30 Sept. 16 Car. 2. died without Issue; and that the said Elizabeth and Mary, as Heirs to both John and Edward Lewis thereupon entered into the said Mannor and Premises and were seised prout lex postulat; and that Elizabeth afterwards married Theophilus Earl of Huntington, and that Mary married Robert Earl of Scarisdale, by virtue whereof the said Earls, in right of their said Wives, entered into the said Mannors and Premises, and were seised prout lex postulat.

They find, that the Executors of Edward Lewis assigned to Elizabeth Lewis Widow, all their interest in the said Statute and Extent, by virtue whereof the said Elizabeth entered and was possessed, but in Trust for the said two Earls, and demised the same unto the said Earls at Will.

They find, that the 6th of November 1672. Sir Gervase Elwaies died, and that William Burroughs survived; and that he afterwards on the 3d of May 30 Car. 2. died, and that on the 30th of July 1680. Administration as to the said Recognizance and Sum of 5000 l. and Process thereupon, was committed to Anne Greenvil (Wife of the said Bernard) and that the said Earls being so seised on the 31st of July 31 Car. 2. the said Bernard Greenvil and Anne his Wife Administred of all the Goods and Chattels of Richard Gerrard, Unadministred by John Gerrard and Francis Gerrard; which Administred of the Goods and Chattels of Richard Gerrard, cum Testamento annexo, did confess themselves to be fully satisfied the said 5000 l. in the said Recognizance acknowledged by Thomas Lewis unto the said Richard Gerrard, and of their Damages and Costs thereby sustained; and prayed that the said Recognizance might be vacated, which was accordingly done; and afterwards on the 28th of September 24 Car. 2. the said Bernard in Right of the said Anne, entered into the said Mannor and Premises; and afterwards, (viz.) on the 1st of June 34 Car. 2. the said Earls entered upon the said Bernard, and made Leases in the Declaration to the Plaintiff, by virtue whereof the Plaintiff was possessed, until ejected by the Defendant; and concludes generally, that if Bernard be guilty, they assess Damages to 12 d. and Costs to 40s. and if Not guilty, they find so.

There

There have been others Points made in the Case by the Counsel that have Argued; some have made more than others: But the Method I shall take will be, to observe the several Transactions that have been in the Case, as they are found in this Special Verdict; and to Consider of what effect and consequence they will be in Law for the Barring of the Extent upon the Statute acknowledged to Elwaies and Burroughs, either in respect of any present Right that he had at the time of the fines levied, or any future Right that should first come to him upon the Satisfaction acknowledged upon Gerrard's Statute, so as to give him the benefit of the second Saving in the Statute of the 4th of Henry the 7th of Fines.

It is found, that there were three Statutes successively acknowledged, and that the last Statute was extended first, which I think makes neither one way nor other; and that on the 5th of July in the Year 1655. the two Extents which were upon Knight's Statute and Gerrard's Statute (which were the 1st and 2d. in time acknowledged) were assigned to Edward Lewis; and two years after in the year 1657. Thomas Lewis, who is found to be in the actual and real possession of the Lands in question; and Edward Lewis in possession prout lex postulat, bargained and sold the Premises to Sir John Lewis in fee, and levied a fine in Trinity Term 1657. to him with Proclamations, and five years passed without any Claim by Edward Lewis.

Before I go any further, I will see what became of the Extents upon the several Statutes to Knight and Gerrard, after this Assignment, Fine and Non-claim.

I Observe, that the Counsel for the Defendant hath Argued, That the Extents upon Gerrards and Elwaies Statutes were Reversions of Reversional Interests; and thereupon have concluded, that Knight's Extent was drowned in Gerrard's Extent, after they came both to be assigned to Edward Lewis.

Which Point they made use of first, to remove Knight's Statute out of the way; for if that he not made an end of some way or other, there having been no Satisfaction acknowledged upon that, it would stand in way of the Defendants Title: And this is also of use to them in another Matter; for if the two Extents upon the Statutes of a latter date be Reversional Interests, the Consequence will be that when Sir John Lewis devised the Inheritance to Edward Lewis, Gerrard's Extent will not thereupon be drowned in the fee, because of the Reversional Interest which was then in Burroughs and Elwaies, that comes between; as is Resolved in the Case of Chamberlain and Ewer in 2 Brownl. 12. For if Gerrard's Statute were drowned by that Devise, it would make an end of it too soon for the Defendants purpose; for that the Estate and Interest by Extent they would suppose to continue at least as to Burroughs

Burroughs and Elwaies, till such time as Satisfaction should be acknowledged, which was not done till Twelve years after.

For my part, I do not think it necessary to the Resolution of the main Point of this Case, to insist upon the Drowning; or to determine, whether the Extent upon Gerard's Statute and Burrough's Statute were Reversions, or in the nature of Reversional Interests; yet because it has not been a Point much spoken to on both sides, I will say something to it by and by, and I do incline to think that they are in the nature of Reversions, and that Knight's Extent after the Assignment to Edward Lewis became drowned in Gerrard's Extent: But whether there were any drowning or no, there is enough in the Case besides to take Knight's Extent out of the way, or to determine it: For I am not satisfied that Knight's Statute, as the Verdict is found, was ever extended at all; for it is found to have been acknowledged before the Mayor of Lincoln, and that the Money was not paid at the day, and that Knight the Conussee died; and that Isaac Knight, his Executor, took a Capias thereupon out of the Common-Pleas.

Now it being a Statute-Merchant, it ought first to have been certified into the Chancery, and from thence a Capias should be issued out, Returnable in the Court of Common-Pleas. And so the Statute of Acton Burnel (30 Ed. 3.) Enacts, and so is Fitz. N.B. 130. Whereas here the Capias goes out of the Common Pleas, and for ought appears was the first step towards the execution of this Statute; for it doth not appear that it was ever certified, or that the Court had any Record before them to award this Capias upon, and so the Execution is quite in another manner than the Statute provides, and in a new Case introduced by the Statute, and therefore it seems to be void, and if so, then the Statute of Knight could not be assigned so as to pass the Interest of it to Edward Lewis, and the fines will have no effect upon it; and indeed it puts it clean out of the Case before us, as if it had never been acknowledged, and the Interest of that Statute must be still in the Executor of Knight.

But then admitting it to have been extended and consequently well assigned, together with Gerrard's Statute, to Edward Lewis; if so, I take it to be drowned in Gerrard's Extent. As to that the Case is no more than this; that after the Statute is extended there comes another Extent upon a puisne Statute (for 'tis found that Gerrard's Statute was extended after Knight's Statute), whether the Estate by Extent upon the puisne Statute be in the nature of a Reversional Interest; for if so, then when the Interest of the first Extent and the latter comes into one person, the first must be drowned; for an Estate for years, or other Chattel Interest, will merge

merge in a Chattel in Reversion that is immediately expectant. And that is Hughes and Robotham's Case in the 1 Cro. 302. pl. 32. If a Lease for years be made, and then the Reversion is granted for years with Attornment, the Lessee may surrender to the Grantee and the Term will grow in the Reversion for years.

To which it is Objected, That an Extent is rather in the nature of a Charge upon the Land, than an Interest of Estate in the Land it self. In the Case of Haydon and Vavasor *versus* Smith in Mo. 662. an Extent is thus described, that it is *onus reale inherens gremio liberi tenementi & tota tempore Executory*, as the words of that Book are, If the Tenant by an Extent purchase the Inheritance of part of the Lands extended, the whole falls. So a release of the Debt will immediately determine the Extent; and it has been compared to one that enters into Lands by virtue of a power to hold until the arrear of Rent is satisfied.

It is true, an Extent is an Execution given by the Statute Law; for the satisfaction of a Debt, and therefore the release of the Debt must determine the Estate by Extent, because the foundation of it is removed; and so if the Inheritance of part of the Land extended comes to the Conusee, it destroys the whole Extent, whereas if a Lessee for years purchaseth the Reversion of part, the Lease holds for the rest: But in case of an Extent, if it should be so, the Conusee would hold the residue of the Land longer, because the profits that should go in satisfaction of the Debt must be less, and this would be to the wrong of him in the Reversion. But in other respects an Extent makes an Estate in the Land, and hath all the properties and Incidents of and to an Estate, and both in no just sensible such an Interest as is only a Charge upon the Land.

An Interest by Extent is a new Species of an Estate introduced by Statute Law: Our Books say, that 'tis an Estate created in imitation of a Freehold, and quasi a Freehold; but no Book can be produced that says, that 'tis quasi an Estate. The Statute of 17 Ed. 3. cap. 9. Enacts, That he to whom the Debt is due, shall have an Estate of Freehold in the Lands; and the Statute of 13 Ed. 1. de Mercatoribus say, That he shall have Seisin of all the Lands and Tenements. When a Statute is extended, it turns the Estate of the Conusee into a Reversion; and so are the express words in Co. 1. lib. 2. fo. 11. and to the Objection, That he does not hold by Fealty is answered, and there are no Tenures that are to no purpose; but he that enters by virtue of a power to hold till satisfied an Arrear of Rent, he leaves the whole Estate in the Owner of the Land, and not a Reversion only.

If a Lease for years be made reserving Rent, and then the Lessor acknowledge a Statute, which is extended, the Conisee after the Extent shall have an Action of Debt for the Rent, and distrain and avow for the Rent, (as in Bro. tit. Stat. Merch 44. and Noy fo 74.) but he that enters by a Power to hold for an Arrear of Rent shall not.

He in Reversion may release to the Tenant by Extent, which will drown the Interest and emerge his Estate, according as it is limited in the Release, Co. 1 Inst. 270. b. 273. Tenant by Statute may forfeit by making a feoffment, Mo. 663. He is to Attorn to the grant of the Reversion, 1 Roll. 293. and is liable to a Quid juris clamar, 7 H. 4. 19. b. Tenant by Extent may surrender to him in Reversion, 4 Co. 82. Corber's Case; therefore these Cases are to shew, That an Extended Interest makes an Estate in the Lands, as much as any Demise of Lease.

And I take it, the consequence of that is, That when an Estate by Extent is evicted by an Extent upon a prior Statute, as Elwaies and Burroughs Extent was by the Extent of Knight's Statute; or where the prior Statute is first extended, and then a Statute of later date is extended, as Gerrard's Statute is found to be extended after the Extent upon Knight's Statute: In both these Cases, the Extent upon the puisne Statute will be in the nature of a Reversional Interest.

A Reversion is every where thus described, (viz.) An Estate to take effect in possession after another Estate determined. 'Tis not in nature of a future Interest, as a Term for years limited, to commence after the end of a former Term; for such an one shall not have the Rent upon a former Lease, as I have shewn before, but he that extends upon a Lessee for years shall; for the Liberate gives a present Interest to hold ut liberum tenementum, but indeed cannot take effect in possession by reason of a prior Extent, or by prior Title.

And this is the very case of a Reversion which is an actual present Interest, tho' it be to take effect in possession after another Estate.

Now I conceive it will plainly follow from this, That Knight's Statute is drowned in Gerrard's Statute upon the assignment of both to Edward Lewis. 'Tis true in Fulwood's Case in the 4 Co. whereas in the Case before us two Estates by Extent were assigned to one person, there is no notice taken of the drowning, which makes nothing against it; for there was no occasion there to stir or insist upon that Point.

But

But the next thing to be considered is, (supposing Knight's Statute to have been well extended and not to be drowned in Gerrard's Statute, after the assignment of both to Edward Lewis) how the fine levied by Thomas Lewis and Non claim will work to the barring of these extended Interests, that were thus in Edward Lewis at the time of the fine levied?

That a Right to an Estate by Extent will be barred by a Fine and Non-claim, as well as the Interest or Right to a Term of years, or any other such like Estate, cannot be questioned, and I think has been agreed of all hands. Saffin's Case in the 5 Co. and the Authority of a great many other Books makes that to be without Controversie.

But the Counsel for the Defendant have insisted upon two things in this Case, by which they have endeavoured to shew, that neither of these Extents should be barred by this Fine; which I shall mention and give some Answer to.

First, It has been said, that it is reasonable to intend, That the Assignment of Knights and Gerrard's Extent to Edward Lewis was in Trust, and to wait upon the Inheritance; and if so, the fine by Thomas Lewis shall only work upon the Inheritance. For it would be a great inconvenience when Estates for years, or by Extent, are taken in and assigned to protect Purchasers from latter Incumbrances, if the Fine of him that has the Inheritance, and also the Trusts of those Estates assigned, should bar his own Trustee. And tho in Ischam and Morris's Case, in the 3 Cro. 109. there seems to be an Opinion, That a Trustee in such Case is Barred: Where the Case is:

That a man had purchased a Lease for years in Trust for himself, and afterwards he bought the Inheritance, and afterwards sold it, and levied a fine to the Purchaser; it is said there, that five years Non claim shall bar the Assignee of the Term: For (saith the Book) the Trust passed inclusively in the Fine. So that it must be understood in that Case, that the Conisee, who was a Purchaser, did not know of this Term, nor any Agreement to have it assigned in Trust for him; and then if the Fine had not barred he had been cheated.

But I conceive the Law would have been otherwise, if by Agreement this Term had been to be assigned in Trust for the Conisee; and this I think goes upon a very good Reason: For he that has the Inheritance in Trust, for whom such a Term or Estate by Extent is assigned, must be taken as tenant at Will to his Trustee, and then that his possession is the possession of the Trustee; the consequence of which is, That the Fine levied by him that has the Inheritance will work only upon that, when it appears that it was so intended, and that the Term should be kept on foot; whereas in Ischam and Morris's Case, for ought appears, there was no such

Intention, nor doth it appear that the Conisee knew of the Term. So that I do agree, That if it were found that these Assignments to Edward Lewis of the Statutes were in Trust, and to wait upon the Inheritance, which was after sold and conveyed by the Fine of Thomas Lewis to Sir John Lewis, that then the Fine and Non-claim will not work to the Barring of either of those Statutes.

But the Special Verdict finds nothing of any Trust, and we cannot intend it without finding; neither is there any thing found to induce or ground any supposition of a Trust: For it is not found that either of the Assignments were made to Edward Lewis for Money, or other Consideration moving from Thomas Lewis or Sir John Lewis, nor to have been made by any direction or a request of theirs, and there was two years distance between the Assignments and the Fine levied and Sale of the Premises to Sir John Lewis, so that they cannot be taken to have been made with any relation to his purchase; and then it will be plain that Knight's Extent (supposing it not to be drowned in Gerrard's Extent) must be barred after five years, without claim upon the Fine in 1657. of Thomas Lewis. For as this Verdict is found, it must be taken that the Estate by Extent was divested and put to a Right; for the Liberate puts the Conisee in actual possession. If an Extent be made upon a Lessee for years, the Lessee after a Liberate to the Conisee may plead an Eviction, and not before the Liberate, Hob. 82. The Conisee after the Liberate is capable of a Release to enlarge his Estate, 1 Co. Inst. 270. b.

Now the Verdict finds, that at the time of the Fine levied in 1657. Thomas Lewis, the Conisor of that Fine, was in actual and real possession, and that Edward Lewis was in possession *pro ut lex postulat*; this actual and real possession in Thomas Lewis could not be, unless he had regained the possession after the Liberate upon the extent of Knight's Statute.

It has been Objected, That he should be taken to have entered by the Consent of Edward Lewis.

There is no such thing found, and so cannot be intended, and then that Estate by Extent must be divested; and so the Case is stronger than that of a Lessee for years before Entry, who gains no actual possession till Entry, and therefore his Interest cannot be properly said to be divested; and yet a Fine will bar him, if he enters not within five years. A fortiori a Tenant by Statute shall be barred, who has had the actual possession by a Liberate, and then afterwards the Conisor gains the actual and real possession, as the Verdict expressly finds, and levies a Fine upon the finding in this Verdict; which I take it to be as strong a Case as can be put as to Edward Lewis, being barred by the Fine as to Knight's Statute.

Why then after that he became barred he shall have five years more to claim, in respect of Gerrard's Statute, this is still upon a supposal that Knight's Statute was well extended, and that it did not down in Gerrard's Statute: For if the Extent upon Knight's Statute were void upon the Reasons mentioned before, or if downed, then must Edward Lewis claim within the first five years after the fine, to save Gerrard's Extent. For I shall grant that he may have five years upon Gerrard's Statute, after the five years Non-claim upon Knight's Extent, and that by the second saving of the Statute of 4 H. 7. for 'tis a new Right then first come to him upon Knight's Extent, being barred.

Therefore I cannot agree with Mr. Finch and some that have Argued for the Plaintiffs in the Writ, That if there be several Extents upon Statutes acknowledged at different times, that they are all present Rights, because the Liberate delivers the Land to the Conisee to hold immediately *ut liberum tenementum*; and therefore if a fine be levied, he that hath the Extent upon the puisne Statute must claim immediately, as well as he that hath the first Extent; whereas the Extent upon a latter Statute, until there comes an Extent upon an elder Statute, is either turned to a Reversion, as I Argued before, or in the nature of a future Interest: And therefore till the first Extent be barred, or some way determined, he that hath the Extent upon the puisne Statute, can have no present Right, and consequently is not bound to claim, but his Right is preserved by virtue of the second saving of the Statute of 4 H. 7. But it appears by the Verdict, that above ten years passed after the fine of Thomas Lewis, without any claim by Edward Lewis; so that I conceive he was barred as to both Extents.

So that which I have taken notice of to have already passed in the Case, is enough to bar the two Extents of Knight and Gerrard, and to let in the Right of the Extent of Elwaies and Burroughs; so that I think they might have entered or made their claim without any thing more. But it is found further in the Case, that in the year 1670. Sir John Lewis devised the Premises by his Will in writing to Edward Lewis and the Heirs of his Body, and for want of such Issue to his two Daughters, who are married to the Earls the Lessors of the Plaintiff, and died in August 1671. and 'tis found that at the time of the Will, and also of the Death of the said Sir John Lewis, the Lands were in the possession of Edward Lewis; and in Michaelmas's Term 1671. Edward Lewis levied a fine of the Lands in question to Francis Lewis, to the use of Edward (the Conusor) and his Heirs.

Now if we should admit that the Extents of Knights and Gerrard's Statute were not barred by the fine of Thomas Lewis, let us see what will become of them upon these things done since. And here I will agree with those that have Argued for the Defendant, that the Devise of the Inheritance to Edward will not down the Extent upon Gerrard's Statute. For, as I have Argued before, I take the Extent of Elwaies and Burrough's Statute, after the abolition by the elder Statute, to be turned to a Reversional Interest, and then the interposing of the Reversion will hinder the downing of Gerrard's Extent in the Fee devised to Edward Lewis, as aforesaid.

Now therefore let us see what is found to have been done further in the Case; and I conceive, if we should grant as the Counsel for the Defendant have urged, That the fine by Thomas Lewis had no effect as to the barring of Gerrard's Extent, nor that the Devise of the Inheritance of the Premises to Edward Lewis will not down the Extent; as I agree it did not, by reason of the Extent interposing that was in Elwaies and Burrough's Case, being (as I have Argued) a Reversional Interest. I say, admitting all this, yet when Edward Lewis, who had the Extended Interests upon Knights and Gerard's Statute in him, and the Estate of Inheritance also in Michalmass Term 1671. Levied the fine to Francis Lewis, to the use of himself and his Heirs, that Fine must destroy and determine the Extended Interests that were in him. For where a fine is levied by him that hath the Fee and Freehold in him, whatever Right, Estate or Interest there is in him besides, passeth inclusively in the Fine; not by way of transferring the very Interest it self, but (as it were) consolidating with the Fee: So as to determine and extinguish such Interest, none can pretend that after this fine of Edward Lewis the Extended Interest did continue in him.

They could not pass to Francis Lewis, as assigned or transferred by the fine; why then they must be destroyed: And I think it cannot be denied, but that Elwaies and Burroughs might have entered immediately, the two former Extents being taken out of the way. And 'tis found that at the time of the fine Edward Lewis was in possession, so that five years passing without Claim after the fine (for 'tis found that Satisfaction was not acknowledged till nine years after,) 'tis plain that the Extent upon Burroughs and Elwaies Statute was barred as to the present Right. For I think its clear, that when a former Statute is determined, whether it be by release of the Debt, by purchase of part of the Lands, by being barred by Non-claim upon the fine, Satisfaction acknowledged or any other means, this lets in the puisne Statute.

And

And now we are come to the great Question in the Case.

Admitting the Extent upon Elwaies Statute was barred in respect of the present Right; Whether a new Right came upon the satisfaction acknowledged upon Gerrard's Statute, so that there should be five years more given by the second saving of the Statute of the 4 H. 7. to claim upon that new Right?

It has been much urged by those that Argued for the Defendant, that whereever there is a Reversion of an Estate to commence after the end of another Estate, that if a fine be levied, tho' the Case be so that he in Reversion may enter or bring his Action, so that five years Non-claim will bar him as to the present Right or Remedy, yet he shall have five years more to claim when the Time is incurred, or the Limitation come? That the first or particular Estate should end.

Now, though the Extents upon the two first Statutes were so avoided, that there might have been an entry upon Elwaies Extent, yet the proper and natural determination of Gerrard's Extent was not till satisfaction acknowledged upon Record, or by perception of Profits appearing upon Record, and then there shall be five years given to claim, and that by virtue of the second saving of the Statute of the 4 H. 7. which is to this purpose, (Viz.) Saving to all persons such Right as first shall grow, remain, descend or come to them after the Fine levied, by reason of any matter before the Fine levied, so that they take their Action or pursue their Right within Five years next after such Right shall come.

Now I do not see that the Condition of this saving was performed by those that had the Right of Elwaies and Burroughs Extent; the Right indeed came after the fine levied, and upon a matter before; so it came after that the Extents upon Knights and Gerrards Statutes were barred, or otherwise avoided. Whether upon the Non claim by the first fine, or their being destroyed by the second fine, which was levied by Edward Lewis; but there was no claim within five years after either of those fines, so the Right clearly was not pursued within five years after the Right first came.

And this has been held necessary to be done where there has been only a right of Action, as in Sawle and Clerke's Case in Jones 211. and Cro. Car. where the Case as to this Point is to this effect:

A Remainder upon an Estate Tail was divested by the fine of Tenant in Tail, who had made an Estate for Life, warranted by the Statute, and died without Issue: He in the Remainder was barred from bringing a Formedon in the life of the Tenant for Life within five years after the fine, and had not a new five years after the death of Tenant for Life, tho' he could not Enter in the life of the Tenant for Life.

And

And the Reason given in Crook's Reports is, because he had no other Right after the Death of the Tenant for Life than he had before; and this plainly distinguisheth that and the Case at the Bar from the Cases that have been cited of June and Smyc's Case in the 1 Cro. 219. and Laund and Tucker 254. for there the Fine was Levied by the particular Tenant, which was a Forfeiture which he in Reversion might choose whether he would take advantage of, and as the case might be, it would be to his prejudice to take advantage of it, where the particular Tenant has charged the Land; and therefore if he would, he should have five years after the Estate determined, to claim as of his Reversion, which is another distinct Right from that of the Forfeiture.

And this was the standing difference that made the distinction, where there should be a new five years given to him in Reversion after the particular Estate determined, and where not; as we see in Margaret Podgers Case in the 9 Co. 106. If the Tenant for years were ousted, and a Fine levied by the Disseisor, he in the Reversion was bound by the first five years Non-claim; because, tho' he could not enter, as if the Estate for years had been determined, or as in the Cases before of the Forfeiture; yet he might have immediately brought an Assize, with which Sawl and Clarke's Case exactly agrees, and goes upon the same Reason. As for Freeman's Case, the Resolution goes wholly upon the Circumstances of Fraud appearing in the Case; the principal of which was, That the Lessee continued in possession, and paid the Rent.

I confess they have gone a little further of late; and now it is taken, That he in Reversion shall have five years after the Term is ended by effluxion of Time, tho' there were no Forfeiture incurred at the Levying of the Fine: Nor no such plain Circumstances of Fraud, as appears in Fermer's Case, and the Case put before, and cited out of Margaret Podgers Case is not held to be Law.

The contrary whereof is taken to have been Resolved in Folley and Tancred's Case in the 24 Car. 2. and I do not intend to shake the Authority of that Case, but admit it to be good in Law; yet I crave leave to observe, That it is a Resolution carried beyond the words of the Statute; for the Right is not pursued within five years next after it first came. For it is agreed in Fermer's Case, fo. 79. that there the Construction was against the Letter of the Statute; and I must say, it is a Construction by Equity, which is a little extraordinary to weaken the force of a Statute which was made for the quieting of mens Possessions, and to add force to Fines, which were of so great regard in Law; and especially to make a Construction by Equity, contrary to the Reason of the Common Law, which took no care of a future Right at all; for he in the Reversion, in case of a Fine Levied at the Common Law, depended wholly upon the Entry or Claim of the particular Tenant,

nant, and in default of that lost his Estate, as in the 1 Inst. 262. b. and in Plowden's Commentaries in Scowell's Case. I say again, I do not design by this to oppose any Case that hath been settled: But I confess I should not have gone so far; if I had not been led by Authority; and am not willing to go a step further.

And now I shall endeavor to shew, that this Case goes a great deal further, and would be a greater strain upon the Statute than yet has been. And,

First, I observe, that upon all or most of the Cases of a Fine, where there has been an Estate for Life or Years in being at the time of the Fine, that the Possession has held still in the particular Tenant, so that he in Reversion had no reason to suspect any fine or other thing done upon the Estate, there being no alteration of the Possession. And this agrees somewhat with the Reason of the Common Law, in case of a Fine Executory; he that had Right was not bound to claim till there were an Execution of the Fine, and Transmutation of the Possession thereupon, as in Plowden's Commentaries 257. b. in Scowell's Case: But here it is found, that the Conusor, and not the Conusees, or the Tenants by Extent, or either of them were in possession; so that the Land being in the possession of a Wrong-doer, they which had Right ought to have watched, and might well suspect that Fines should be Levied to the prejudice of their respective Rights. It is said in Farmer's Case, If a meer Wrong-doer having got the Possession, levie a Fine on purpose to bind the Right, this shall bind notwithstanding his unjust Design.

But the Differences that I chiefly rely upon, to distinguish the Case before us from the Cases of Reversions upon Estates for Life and Years, or the like particular Estates, are these:

1. That in those Estates there is either, by an express Limitation of the Parties, or an operation of Law, a certain and particular Term or End of the Estate, which until it happens, it has not its proper determination: Which an Estate by Extent has not. I know it has been much insisted on, that the natural and proper determination of an Extent is satisfaction by a perception of Profits, according to the extended Value; whereas I cannot see but a release of the Debt, or satisfaction by a sudden Accident, is as properly a determination of the Extent, as if it were run out by perception of Profits, according to the extended Value. For when the first Extent is out of the way the second is immediately to take place; or why this acknowledging Satisfaction on Record, should be the natural and proper determination of the Extent more than a Release of the Debt by the Conusee, or destroying of it by a Fine, which is an higher Record than the Statute, or the Entry of Satisfaction acknowledged thereupon.

2. To let him that has the Reversion upon an Estate by Extent have five years to claim after the first Extent run out by perception of Profits or Satisfaction acknowledged, is to let in a Claim after an Estate, that no man can see to the end of: For when it shall be satisfied by the Profits no man can tell, and can much less tell that Satisfaction will ever be acknowledged; whereas other particular Estates have a known and determinate Limitation, In the other Case it could not be computed within what compass of time a possession should be quieted, and so the Statute of Fines, in a great measure would be defeated of its end. But,

3ly, and principally, It should be in the power of the party that has the Extent in Reversion, to protract the time as long as he pleased; for till he thinks fit to bring the Scire facias ad computandum, he nor no one else can say the Statute is satisfied. For that must appear by an account taken in the Scire facias, nor none can compel the acknowledging of Satisfaction, and so it should be at the pleasure of Strangers to him that is in possession by a Fine to make his Estate liable to a future Claim as long as they pleased; and sure this would render the Statute of Fines of little or no effect. And this makes an Estate by Extent, to differ wholly from an Estate for Life or Years, or such other like particular Estate, which will end of it self, and cannot be protracted longer than the proper limitation of the act of any one whatsoever.

I will conclude with an Answer to an Objection, that has been much insisted upon by those that Argued for the Defendant, That an Extent begins by Record, and cannot end but by Record, viz. either by an account taken upon a Scire facias or Satisfaction acknowledged upon the Record of the Statute; or at least, he that is in Reversion, is bound to take notice of any other determination of the Extent.

To which I Answer, It begins by Record, but it may end without Matter of Record; for a Release by the Conusee after the Extent determines it to all intents and purposes; and undoubtedly in such case he which hath a puisne Statute may enter, an Extent upon an Elegit begins by Record; yet when satisfied by perception of Profits, he in Reversion may enter: So that the Scire facias, as appears by our Books, is to be brought upon another Reason, and not because the Extent cannot end but by Record, but 'tis because of the incertainty of the Expences that must be satisfied. And why should not they which have had the right of Burroughs's Extent be bound to take notice of the Fines that have been levied, as much as the acknowledging of Satisfaction? And a Fine is much more a publick Record than the other, especially since the Statute of the 4th of H. 7. has provided for the making of Proclamations upon it.

Some Remarkable and Curious

CASES

IN THE

COURT

OF

CHANCERY.

Termino Sanctæ Trinitatis Anno 22 Car. II.

In Cancellaria.

Marsh *versus* Lee.

A Bill in Chancery was brought by Marsh, and an Answer put in thereto.

The Case was thus:

One English being seized of the Mannor of Wickfall, and of the Mannor of Monfield, in 1649. Mortgaged part of the Mannor of Wickfall to Burrell for 1000 l. Afterwards in 1655. he acknowledges a Statute to Burrell of 800 l. for the payment of 400 l. Afterwards in 1661. English Mortgaged both these Mannors to Mrs. Duppa for 7000 l. Afterwards in 1665. English Mortgaged the Mannor of Wickfall to Lee for 1000 l. Lee having no notice of the former Mortgages. But afterwards Lee coming to have notice of the Mortgage to Duppa, purchases in the two Incumbencies to Burrell, (Viz.) the Mortgage of part of the Mannor of Wickfall, and the Statute. And now Marsh, Executor of Duppa, sues Lee, who pleads this whole Matter.

My Lord Keeper, assisted with Hale Chief Baron and Justice Rainsford, held, That Lee might make use of these Incumbrances to protect his own Mortgage. For they said, that he had both Law and Equity for him.

First, He had Law; for that he had a precedent Mortgage in 1649. (which indeed was but upon part) and also the Statute in 1655. so that while these remained in force, Marsh could not come in.

Next, He had Equity; for he having a subsequent Mortgage, (yet) it being without Notice, he ought to be relieved in this Court. And therefore my Lord Chief Baron put the Case, as if the first Mortgage had been of the Manor of W. to Burrel; and afterwards it had been mortgaged to Duppa, and afterwards to Lee, not having notice; if afterwards Lee bought in Burrel's Mortgage, he shall hold the Estate against Duppa, until he be satisfied for both the Money which he paid Burrel and also his own Money lent upon the last Mortgage: And for that he said, that it had been so adjudged in *Camden Scaccarij*, in the Court of Equity, since the King's death, in one *Shelley's Case*. Next he put the Case of the Statute which English entered in to Burrel in 1655. and was afterwards bought by Lee from Burrel. He held that Duppa shall not bring Lee to any Account upon this Statute here in Equity, any otherwise than he may do at Common Law.

Nota, It was agreed, that the Lands were extended upon the Statute at the third part of the true value. Now at Common Law the Conusor, or he that claims under him, must bring a Scire facias ad computand', as in the 4 Co. 69. b. But then the Conusor shall not account according to the true value, but according to the extended value, and also for the whole Statute: And if the Conusor is satisfied by the extended value the Conusor shall recover; or if the Conusor will pay down the rest of the Money which is behind with Damages, he shall also recover. But if the Conusor will sue the Conusor in a Court of Equity, then he shall bring him to Account for what he hath received of the Profits above the extended value.

Now then our Case here is somewhat more: For Lee has also Equity on his Side, and therefore Duppa shall not bring him to Account for what he has received above the extended value, unless he has also received enough to satisfy his own Mortgage of 2000 l. as well as the Statute: and therefore if Marsh will take off this Statute by a Suit in this Court, he must be content that Lee shall Account upon the extended value for the whole 800 l. and Damages.

Secondly.

Secondly, They held, that whereas part of the Mannor of W. was mortgaged to Burrell; but that now the whole Mannor was mortgaged to Lee, that (yer) the first Mortgage should not extend to protect more than that part of the Mannor which was first mortgaged to Burrell.

And my Lord Chief Baron Hale put the Case thus: If a man is seised of 60 Acres, and mortgages 20 to A. and then mortgages the whole to B. and then mortgages the whole to C. and afterwards C. purchases in the first Mortgage, that shall not protect more than the 20 Acres; but it shall protect those 20 Acres so as B. shall never recover that until he pay C. all the Money upon the first and last Mortgage.

But Hale said, That he thought that in this Case, inasmuch as the Mortgage to Lee was only of part of W. that therefore Marsh might bring Lee to an Account upon the extended value, whereupon these two Mannors were extended upon the Statute; and if Lee had received the Money due upon the Statute by receiving of the Profits according to the extended value, or if she will pay down the residue of the Money due upon the Statute, or if she will pay down so much as the proportion will come to for Monfield, that then she may discharge the Mannor of Monfield.

But then my Lord Keeper asked him, how he would have it appointed, and how much should be laid upon Monfield, and how much upon Wickfal; for that part of W. is under that Extent.

To which Hale Answered, That if Marsh did sue Lee for the discharge of this Statute from Monfield, that Monfield should be Discharged by her paying down as much as the proportion comes to; or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the Court.

Nota, Sir H Fynch, Counsel for Lee, cited Primate and Jackson's Case, Grove and Grove's Case, and Mrs. Calamy's Case: All which were Resolved in this Court, That a Purchaser or Mortgagee coming in upon a valuable Consideration without Notice, and purchasing in a precedent Incumbrance, it shall protect his Estate against any person that hath a Mortgage subsequent to the first, tho' before the last Mortgage; tho' he purchased in the Incumbrance after he had Notice of the second Mortgage.

White *versus* Ewet.

AT a Re-hearing before my Lord Keeper, assisted with Justice Vaughan and Turner, concerning the Redemption of a Mortgage which had been made above 40 years since.

My Lord Keeper Declared, That he would not relieve Mortgages after 20 years; for that the Statute of 21 Jac. cap. 16. did adjudge it reasonable to limit the time of ones Entry to that number of years: Unless there are such particular Circumstances as may vary the ordinary Case, as Infants, Feme Coverts, &c. are provided for by the very Statute; tho' these Matters in Equity are to be governed by the Course of the Court, and that 'tis best to square the Rules of Equity, as near the Rules of Reason and Law as may be.

Termino Sancti Michaelis, Anno 22 Car. II.

In Cancellaria.

Peter Pheasant *versus* Anne Pheasant, The Lord Mayor of London, and Sir Thomas Playet, Chamberlain of London, &c.

The Case was this:

Anne Hadly (now Pheasant) one of the Defendants, being an Orphan of London, and having an Estate of 3 or 4000 l. in Money in the Court of Orphans there, was married to W. Pheasant, elder Brother to the Plaintiff. W. Pheasant before he was at the Age of 21 years, and not having taken out this Money, dies, having bequeathed this Money inter alia to his said Wife, provided that she should not claim Dower, &c. Notwithstanding she brings Dower against the now Plaintiff, Brother and Heir to her late Husband. Whereupon he brings this Bill in Chancery to make Discovery of this Estate, and to compel her to release her Dower, or renounce this Devise; and thereupon obtains an Injunction, to stay Proceedings in the Writ of Dower.

The Point was, Whether this Money in the Court of Orphans were Devisable, or no?

Serjeant Goodfellow Argued, That it was Devisable as a Chattel personal in the Testator's possession, and vested in the Baron; the Court of Orphans have but the Custodiam, Co. Entries 346. 1 Roll. 550. the Chamberlain of London is the Officer intrusted,
and

and a sole Corporation to this purpose, so as to take Recognizance which shall go to his Executors, and is the only Corporation of that nature in England. His possession is the Testator's actual possession, Latch 127. If the Servant be robbed, the Master shall have the Action, in the 1 Cro. 37. This is not a Debitum, but a Depositum, as in Custodia in gremio legis by the Custom of London, as if Money had been brought into Court here by a Compulsory Order, in which case it would have vested in the Husband. Now in the Court of Orphans they compel People to bring in the Money, or to give Security, and they pay no Interest, only allow Finding-Money, that is, for the Orphans Maintenance, and no more. Seeing the Feme is intitled to Dower immediately, it were hard that the Baron should not have the Portion; Debts he shall not have because of his Latches, in not bringing an Action whereby to reduce them to Property; but this cannot be had until the Wives full Age. Upon the Marriage of Orphans the Custom is, to appoint the Common Serjeant to Treat and take Security for the Orphan.

Serjeant Maynard contra. This was a Chose en Action, Debts lies for it, and it cannot be recovered without an Action. Interest is allowed for it according to the Custom (tho' not Statute Interest) and proportionable to the Sum. And the Case of Dr. Ent versus Adrian was, by the Custom of London, If a man dye leaving three Sons, his Estate shall be equally divided amongst them; and if either of them dye within Age, his part shall survive to the other. The father taking notice of this Custom, Devised, That if any of his Sons dye within Age, his part should not survive, but that it should go to J.S. It was Resolved, that the father could not thus give the Childs Portion, because but a possibility, and a thing not vested in himself.

Wyld said, That when he was Recorder he certified the Custom in that Case to be, That the Father might Devise.

Ouria, viz. Bridgman, Lord Keeper (Twilden and Wyld assisting) We are clear of Opinion, that this was a Chose en Action and not Debttable. A Trover and Conversion lies not for it, if it be refused to be paid: It was the Latches of the Husband, that he did not recover it; for by the Custom it is to be paid at the full Age or Marriage of the Female Orphan. The Chamberlain is not a Servant to the Orphan, but to the Mayor. If it were purely a Depositum, it must be paid in specie without Interest; but they pay Customary Interest: And tho' whilst the Orphans are under Age (and Unmarried, if Women) they give them Finding Money only; yet at the end of all, when the Orphan comes at full Age, (or if a Female marries) all is Cast up, and the Interest is paid. The word Custodia in Pleading imports an Interest, as in the Case of Guardian in Socage, &c. the Lord Mayor, &c. have a Special Interest

Interest in it, and if it be lost or miscarry, they are to Answer it. Let the Injunction be Dissolved.

Nota, This Case was referred by my Lord Keeper to Justice Wyld. A man opens a Mine in his Land, and digs until he comes under the Soil of another; whether he can follow his Mine there? And he certified his Opinion, that he might: But if the Owner dig there also, he conceived that he might then stop his farther progress. And in Cornwall it is their Use, that if a man begins a Mine in his own Land, he may proceed in the Vein through another mans Ground.

Note, If a Bill in Chancery be Exhibited against a Peer, the Course is first, for my Lord Keeper to write a Letter to him, and if he doth not answer, then a Subpcena, and then an Order, to shew Cause why a Sequestration should not go; and if he still stands out, then a Sequestration: for there can be no Process of Contempt against his Person.

Termino Sanctæ Trinitatis, Anno 29 Car. II.

Clobberie's Case.

In one Clobberie's Case it was held, That where one Bequeathed a Sum of Money to a Woman, at his Age of 21 years, or Day of Marriage, to be paid unto her with Interest, and she died before either, that the Money should go to her Executor; and was so Decreed by my Lord Chancellor Fynch.

But he said, If Money were bequeathed to one at his Age of 21 years; if he dies before that Age the Money is lost.

On the other side, If Money be given to one, to be paid at the Age of 21 years; tho' if the party dies before, it shall go to the Executors.

Termino

Termino Sancti Michaelis, Anno 30 Car. II.

In Cancellaria.

Haymer Vid. *versus* Haymer.

The Case was thus:

The late Husband of the Plaintiff, before their Marriage, had entered into Articles with the Plaintiff; whereby it was Agreed, That certain of the said Haymer's Lands should be settled before the Marriage (which was then intended between them) should be solemnized upon him and the Plaintiff, and the Heirs of his Body, by the Plaintiff, but died before the Settlement was made.

In pursuance of the said Articles the Plaintiff married him, and after his Decease the Plaintiff Exhibits her Bill, to have those Articles executed: which was Decreed accordingly against the Heir at Law of the Husband.

Altho' it was Objected, That the Articles being to make the Settlement before Marriage, it was a Clavier of the benefit of them, the Plaintiff marrying before it was done; and the Plaintiff being the sole party with whom they were made, her marriage with the other party before they were performed, was a Release in Law.

Note, The Lands were mortgaged to one that had no Notice of the Articles.

It was Decreed, That the Plaintiff should Redeem, and hold for her Life, and that her Executors should detain the Land till the Money was raised that she had been out upon the Redemption.

Termino

Termino Sancti Hillarij, Anno 31 & 32 Car. II.

In Cancellaria.

Sir Oliver Butler's Case.

UPon a Scire facias to Repeal a Patent, granted by this King to Sir Oliver Butler, for a Marker to be kept at Chatham; reciting, That there was an Ancient Marker long before kept at Rochester, within Half a Mile of Chatham, and that there was an Ad quod damnum taken out before the New Patent; and the Inquest thereupon taken, found it not to be to the Damage of any, and that it was Executed by Surprize and without Notice; and that notwithstanding it was to the great Damage of the former Market, &c.

To this Scire facias Sir Oliver Butler Demurred.

And it was Argued by his Counsel, That this Patent could not be Repealed, because it was preceded by a Writ of Ad quod damnum; whereupon it was found to be to no Bodies Damage, and that should conclude all; or at least, the King could not bring a Scire facias to Repeal his own Patent.

But the Lord Chancellor Fynch (assisted by North Chief Justice of the Common-Pleas, and Justice Jones) gave Judgment for Repealing of the Patent: For the Return of the Writ of Ad quod damnum was not Conclusive, and here by the Demurrer it is Confessed to be to the Damage of the former Market. And where a Patent is granted to the prejudice of the Subject, the King of Right is to permit him, upon his Petition, to use his Name for the Repeal of it in a Scire facias at the Kings Suit, and to hinder multiplicity of Actions upon the Case; for such Actions will lie notwithstanding such void Patent.

Quintus

Termino

Termino Sanctæ Trinitatis, Anno 32 Car. II.

In Cancellario.

Sir Jerom Smithson's Case.

A Motion was made for a Ne exeat Regnum against Sir Jerom Smithson; for that his Wife had Sued him in the Ecclesiastical Court for Alimony, and it was suspected that he would go beyond Sea to avoid the Sentence: And the Writ was granted.

And the Lord Chancellor said, That it had been so done before; for this Court was to aid the Ecclesiastical Court in such Cases.

And likewise the Court being Informed of his Ill usage of his Wife, a Supplicavit de bono gestu was granted.

My Lord Hollis's Case.

Pasche 26 Car. II.

My Lord Hollis's Case was thus: An Hundred Pounds was Lent by his Lady, and in the Note which was first given for it, it was written that the Money was to be disposed as the Lady Hollis should direct. An Action at Law for this Money being barred by the Statute of Limitations, a Bill was exhibited for Relief, and the Statute of Limitations insisted upon. But in regard the Money was looked upon as a Depositum, and a Trust thereupon to the Lady, a Decree was obtained for the Money.

Sir William Beversham's Case.

He had purchased a Mannor, and a Copyhold being a little before Escheated, which was not intended to pass in Demesne was left out of the particular; yet the Conveyance was sufficient to pass it in Law.

And the Vendor Exhibited a Bill to be relieved, and obtained a Decree, to hold by Copy of Sir William Beversham. Vide 1 Roll. 397. Averments not to be admitted in Chancery contrary to the purport of a Deed.

P p

Anonymus.

Anonymus.

Trin. Anno 31 Car. II.

The Case was thus:

J.S. made his Will, (his Wife being at that time with Child) where he ordered that all his Personal Estate, after his Debts and Legacies paid, should be laid out in Land (in case he had a Son) and be settled upon his Brother, for preservation of his Name, and Devised, That if his Wife were delivered of a Daughter, that she should have 3000 l. paid her at her Day of Marriage, provided that she married with her Fathers Consent, and otherwise but 1000 l. and also Devised, That the Brother should have 80 l. part of the Interest of the 3000 l. for the Education of the Daughter.

The Testator dies, and the Wife has a Daughter. The Question was, Whether the Daughter should have the remaining part of the Interest of the 3000 l. or the Executors should have it in Trust for the Brother, and so to be laid out, &c.

It was said for the Brother, that the Father intended the Daughter but 3000 l. at the most, and that appointing 80 l. part of the Interest of her Education, excluded her from the rest; and its a Devise, That all his Personal Estate shall be laid out, &c.

Curia. There is nothing to be laid out until the Debts and Legacies paid; the 80 l. is not to the Daughter, but for the Mother. 'Tis taken for granted, that where a Sum of Money is devised to a Child at such an Age, it shall have the Interest in the mean time, rather than the Executor shall swallow it; but clear, when no Maintenance is otherwise provided for.

The Lord Chancellor Decreed it for the Daughter, and that the Executors should account for what Interest he paid the Brother.

Note, Tho' it be said, that the Money to be laid out after all Legacies paid; yet all, besides what serves to pay the Legacies, should be laid out presently.

Anonymus.

Anonymus.

Trin. Anno 31 Car. II.

A Devise of 100 l. to J.S. at the Age of 21 years; and if J.S. died under Age, then J.N. and A.B. to have the 100 l. or else the Survivors of them.

A.B. and J.N. dye both in the life of J. S. and before the Age of 21 years, and then J.S. dies under the Age of 21 years.

The Administrator of J.N. who survived A.B. sued, and obtained a Decree for the 100 l. for tho' he died before the Contingency happened, yet his Administrator should have it.

Charles Blois & al', Plaintiffs, *versus* Dame Jane Blois and Jane Blois Infants, Defendants.

Mich. Anno 31 Car. II.

The Case was thus :

Sir William Blois, who had Issue the Plaintiff and two Daughters by a former Venter, and Jane the Defendant by a second Venter; upon his second Marriage settled Lands for the Joynture of his Wife, and after her decease (in case he had Issue only a Daughter) to raise 3000 l. for that Daughter, to be paid her at the Day of Marriage, so that she married after Sixteen, or otherwise at the Age of Eighteen years; and if she died before either, then his Heir to have the benefit.

Afterwards Sir William Blois by his Will devises the Reversion of his settled Lands, and all his other Estate, to Jane his Relict, one of the Defendants, and three others; and says, That after the Son, by a convenient Match, shall have raised 9000 l. for his three Daughters, that then they should let the Son, the now Plaintiff, have his Estate.

The Question now was, That if the Daughter by the second Venter had 3000 l. paid her, whether she should have any further benefit by the Settlement, and so take a double Portion, one upon the Will, and another upon the Settlement?

The Decree made by my Lord Fynch was, That if the Heir paid 9000 l. the Security by the Settlement should be discharged, the Will being but Cumulative Security, and so the Defendant Jane was to have but one 3000 l. and be subject to the same Contingencies with the Settlement, and gave the Heir two years time to pay the Money; and in the mean time Jane to have a third part of the Profits of the Land devised.

My Lord Chancellor cited one Pyne's Case; where a man had secured Portions for his Children, and afterwards by his Will Devised to each of them a like Sum; it was held, that this would not double their Portions, unless plainly proved that he intended to do so.

Nota, If one sue in Chancery an Executor of one Obligor, to discover Assets, you must make all the Obligors parties, that the Charge may lye equal.

Quere, Whether you may not sue the Principal, and leave out them that are bound only as Sureties? But 'tis clear, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone, to discover Assets, &c. because the Bond is drowned in the Judgment.

Turner's Case.

A Mortgage was made in Fee, which descended to the Heir at Law, and the Money, ten years since paid to him. The Executor of the Mortgagee preferred his Bill, and had a Decree for the Money; but without Interest.

My Lord Chancellor went upon the Reason of the Case in Littleton, That if a Feoffment be made upon Condition to re-enter upon the payment of a Sum of Money, and not expressed to whom to be paid, there (after the Death of the Feoffee) it must be paid to the Executor, and not to the Heir. So here, tho' the Proviso was to pay to the Feoffee, his Heirs or Executors; yet when the Day is past, 'tis as much as if no person had been expressed, and then Equity shall follow the Law and appoint it to the Executor.

Termis Pasche, Anno 32 Car. II.

In Cancellaria.

Anonymus.

A Impropiator devised to one that served the Cure, and to all that should serve the Cure after him, all the Tythes and other Profits, &c. Tho' the Curate was incapable to take by this Devise in such manner, for want of being Incorporeate and having Succession; yet my Lord Chancellor Finch Decreed, That the Best of the Devisee should be seized in Trust for the Curate for the time being.

Broadhurst *versus* Richardson & al.

A Man had Issue three Daughters, and devised to his three Daughters 540 l. equally to be divided between them; that is to say, 180 l. apiece; but if any of them died without Child, her part to go to the Survivors.

One of the Daughters married Broadhurst, and before the Portion paid she died without Issue.

Broadhurst Exhibits his Bill against the Executor, and the two surviving Sisters, and had a Decree for the 180 l. For a Sum of Money cannot be Entailed.

Anonymus.

If Lands be devised for the payment of Debts and Legacies, and the residue of the Personal Estate be given to the Executors after the Debts and Legacies paid; the Personal Estate shall notwithstanding, as far as it will go, be applied to the payment of the Debts, &c. and the Land charged no further than is necessary to make up the residue.

Termis

Termino Sancti *Hilarij*, Anno 32 & 33 Car. II.

In Cancellaria.

Sayle & Freeland & al' Infants.

The Bill was to Redeem a Mortgage made by the Father of the Defendants, or to be foreclosed.

The Defendants by Guardian Answered, setting forth, That their Grandfather was seised in fee, and made a Settlement, whereby he entailed the Estate; but with a power of Redemption by any Writing published under his Hand and Seal in the presence of three Witnesses.

And the Case was; That he made his Will under his Hand and Seal, wherein he recited his Power, and declared that he Revoked the Settlement; but the Will had but two Witnesses, which subscribed their Names, tho' a third present, and died. The Lands descended to the Father, who made the Mortgage; and the Defendants claimed by virtue of the Entail.

The Decree was that the Mortgage Money should be paid.

First, My Lord Chancellor said, that here was an Execution of the Power in strictness, tho' the third Witness did not Subscribe.

Secondly, If there had not; that Equity should help it in such a little Circumstance where the Owner of the Estate had fully declared his Intention. There is a difference where a man has power to make Leases, &c. which shall charge and incumber a third persons Estate, such Powers are to have a rigid Construction; but where the Power is to dispose of a mans own Estate, it is to have all the favour imaginable.

It was offered by the Counsel, That where Tenant in Tail did bargain and sell his Estate, that seeing he had power over it, notwithstanding there were no Fine and Recovery, a Court of Equity should Decree against the Heir.

But my Lord Chancellor said, that he would not supersede Fines and Recoveries; but where a man was only Tenant in Tail in Equity, there this Court should Decree such disposition good; for a Trust and Equitable Interest is a Creature of their own, and therefore disposable by their Rule. Otherwise, where the Entail was of an Estate in the Land.

Nota,

Nota, In the Case supra, that the Court would not Decree the Infants to be foreclosed till they came of Age; (tho' sometimes tis so done;) because this Mortgage depended upon a disputable Title, and so no Money could be expected upon Assignment of it over.

Termo Pasche, Anno 33 Car. II. A In Cancellaria.

Sir Thomas Littleton's Case.

In this Case my Lord Chancellor Declared, That it was a constant Rule, That the Money to be paid upon Mortgages in Fee, whether forfeit or not before the death of the Mortgagee, sh^d go to the Executor.

1. If a man had Lands in Fee, and other Lands mortgaged to him in Fee; by a Devise of all his Lands the Mortgage would pass.

2. If a man had but the Trust of a Mortgage of Lands in D. and had other Lands in D. by a Devise of all his Lands in D. the Trust would pass: But here a Will devised Lands to J. S. in D. S. and T. and all his Lands elsewhere, when he had a Mortgage of Lands that sh^d not lye in D. S. or T. which were of more value than the Lands in D. S. and T. The Decree was, that the Mortgage should not pass; for he could not be thought to mean, to comprehend Lands of so much value under the word (elsewhere) which is like an (Ecce) that cometh in comento calando; and besides, that there were some other Circumstances in the Will that did seem, as if he intended not to pass the Mortgage Lands.

Anonymous.

A Bill was Exhibited, setting forth, That the Defendant in a Replevin had allowed for a Rent charge; and Issue was taken thereupon, upon the Devise of the Grantor, and it was found for the Defendant.

Verdict the Plaintiff complained of, alledging that the Rent pretended to be granted, had not been paid in 50 years, and other Circumstances, to render the Grant suspicious, &c.

The

The Lord Chancellor Decreed, That there should be a New Trial, the Complainant paying the Costs of the former.
 Note, This could not have been tried again at Law; because the Verdict in Replevin is conclusive.

Cage versus Russel.

A Feme Coyert having Power by her Will to Devise certain Lands, devised them to her Executors to pay 500 l. out of them to her Son, when he should attain the Age of One and twenty years; provided, that if the Father of the Son did not give a sufficient Release to the Executors, of the Goods and Charrels remaining in such an House, then the Devise of the 500 l. should be void and to go to the Executors.

After her Decease, a Release was tendered to the Father, who refused it; and then the Son exhibits a Bill against the Father and the Executors for the 500 l. and to compell the Father to Release.

The Executors in their Answer insisted upon the Refusal as a Forfeiture of the 500 l. And the Father said, That tho' he had for some Reasons before refused, he was now ready to Release.

The Lord Chancellor Decreed the Payment of the 500 l. and said, that it was the standing Rule of the Court, That a Forfeiture should not bind where a thing may be done afterwards, or any Compensation made for it. As where the Condition was to pay Money, or the like. But in the Case of Fry and Porter in the 22th of Car. 2. (which see at large in the Modern Reports) where a Devise was of an House, upon Condition that the Devisee should marry with the Consent of three persons, and be married without Consent, it was an immediate Forfeiture; for Marriage without Consent was a thing of that nature that no after Satisfaction could be made for it: But if where there is a Devise over to a third Person, after a Forfeiture by the first, a Forfeiture in such a Case would be generally binding; but here 'tis said, that it shall go the Executors, &c. which was not to be considered, because it is no more than what the Law implied.

Termo

Termino Sancti Michaelis, Anno 33 Car. II.

In Cancellaria.

Anonymus.

One Debitor 250 l. to his Son, and makes his Wife Executrix, who marries another Husband.

In a Bill brought against them for the Legacy by the Son the Defendants would have discounted Maintenance and Education.

Which was not permitted by the Court, so as to diminish the principal Sum; for it was said, that the Mother ought to maintain the Child: But a Sum of Money paid for the binding of him out an Apprentice was allowed to be discounted.

Note, It is the Course here, that where a man dies in Debt, and under several Incumbrances, (viz.) Judgments, Statutes, Mortgages, &c. and the Heir at Law buys in any of them that are of the first Date; if those which have the latter Securities prefer their Bill, the Incumbrances brought in shall not stand in their way for more than the Heir really paid for them.

Goylmer *versus* Paddistori.

The Case was thus:

Thomas Goylmer in 1653. being seised of certain Lands in Fee of the value of 14 l. per annum, and there being a Marriage in Treaty between the Plaintiff (the Brother of Thomas) and Anne Wells, the said Thomas did make a Writing, sealed and delivered by him; which was to this purpose, (Viz.) That if the Marriage takes effect between my Brother and Anne Wells, she being worth Eightscore Pounds, I do promise, that if I dye without Issue, to give my Lands in, &c. to my Brother and his Heirs, or to leave him 80 l. in Money; And for the true performance of this, I bind my self, my Heirs, Executors and Administrators.

After which the Brother (the now Plaintiff) and the said Anne Wells did intermarry, and he was worth Eightscore pounds: But Thomas Goylmer did afterwards marry, and having no Issue, he did settle the Lands upon his Wife for Life, the Remainder to his own right Heirs; (this was a Joynture settled before Marriage) and did afterwards devise the Land to her in fee, and died without Issue.

His Wife afterwards devised it to the Defendant's Wife in fee; and now the Plaintiff exhibited his Bill to have the Land Conveyed according to the Agreement above.

But for the Defendants it was much insisted upon, that this being to settle the Lands, in case Thomas should dye without Issue, it should not be regarded in this Court; for the Execution of a Trust of a Remainder or Reversion in fee, upon an Estate Tail, shall not be compelled, because it is subject to be destroyed by the Tenant in Tail; as here Thomas might have done, in case he had made a Settlement according to the import of that Writing, who therefore could not have been compelled himself to have executed this Agreement.

But the Lord Chancellor Fynch Decreed the Land for the Plaintiff; because it was proved that the Marriage with the Plaintiff's Wife was in expectation of the performance of this Agreement, and he was obliged to have left the Land to the Plaintiff if he had had no Issue.

Termino

Termino Sanctæ Trinitatis, Anno 34 Car. II.

In Cancellaria.

Collet versus Collet.

William Fox having three Daughters, Mary, Elizabeth and Martha, (the two latter being Married, and the first a Widow) by his Will devised in these Words, (Viz.)

I give unto Martha my Daughter the Sum of 400 l. to be paid unto her by my Executors within one year next after my decease: But I will, and my desire is, that Cornelius Collet (the Husband of Martha) upon the payment of the said 400 l. shall give such Security as my Executors shall approve of, that the said 400 l. shall be laid out within 18 Months next after my decease, and purchase an Estate of that value to be settled and assured upon her the said Martha, and the Heirs of her Body lawfully Begotten.

And in the Close of his Will were these words following: (Viz.)

I Will, That after my Debts which I shall owe at the time of my Decease, and my Funeral Expences, and the Probat of this my Will be discharged; then I do give all the rest of my Personal Estate Unbequeathed, to purchase an Estate near of as good value as the same Personal Estate shall amount unto, within one year next after my my decease. Which said Estate so to be purchased, I Will shall be settled and assured unto and upon my said three Daughters, Mary, Elizabeth and Martha, and the Heirs of their respective Bodies lawfully begotten for ever; or otherwi'e my said Daughter Mary, and the Husbands of my said two other Daughters Elizabeth and Martha shall for such Moneys as they shall receive of my said Executors, for the Overplus of my Personal Estate, enter into one of more Bonds in the double Sum of Money as each part shall amount unto (the same being to be divided into three parts) unto my said Executors, within 18 Months next after my decease to settle and assure such part or Sum of Money as each of them shall receive and have by this my Will. for the Overplus of my Personal Estate, unto and upon the Child and Children of my said Daughters, Mary, Elizabeth and Martha, part and part alike.

Martha, the Wife of Cornelius Collet died within six Months after the Testator, leaving Issue only a Daughter, who died within four Months after the Mother; the other two Sisters surviving.

Cornelius Collet took out Letters of Administration both to Martha his Wife, and likewise to his Daughter; the Four hundred Pounds, and likewise the Surplus of the Personal Estate, being unpaid or disposed of.

Cornelius Collet preferred his Bill against the Executors and the surviving Sisters, and thereby demanded the 400 l. and likewise a third part of the Surplus, which amounted unto 700 l.

And the Cause came to be heard before the Lord Chancellor upon Bill and Answer, who Deereed the 400 l. to the Plaintiff; but as to the Surplus of the Estate the Bill was dismissed, altho' it was much insisted upon for the Plaintiff, that he might have given Bond to secure the Surplus for his Child, and so from the Child it would have come to him as Administrator: But seeing that no Interest could vest in the Child till the Election were determined (it not being material as to this Point, whether the Executors or the Husband had the Election) the Father could not claim it as Administrator to the Child. And then if the Money had been laid out in Land, and the Settlement, according to the direction of the Will, the Husband would have had no benefit: for there would have been a Joint Estate for Life in the Daughters with several Inheritances, and no reversion of the Jointure by the Marriage and having Issue, Co. Inst. — and so no Tenant by the Courtesie. Therefore as to the Surplusage the Bill was Deereed to be dismissed.

Note, As to the 400 l. the Order of my Lord Chancellor was, That Interest should be paid for it from the time of bringing the Bill.

Termine

Termino Sancti Michaelis, Anno 34 Car. II.

In Cancellaria.

Wells versus The Lord Delaware.

WEST, Petitioner of the Lord Delaware, Exhibited his Bill against the said Lord, setting forth: That upon a Marriage agreed to be had between him and the Daughter of one Mr. Huddleston, with whom he was to have 10000 l. Portion. The Lord his Father Agreed to settle Lands of such yearly value for the Wives Joynture, for their maintenance and the Heirs of their Bodies, &c. That the Wife being now dead (and without Issue) and no Settlement made, the Bill prayed an Execution of the Articles, and a discovery of what Incumbrances there were upon the Lands to be settled.

To this the Lord Delaware Answered, That he never intended to settle Lands, but for the Wives Joynture only, and that the Plaintiff her Husband was not named in the Articles, and so was Adversely, He need make no Settlement; and upon that Reason the Plaintiff could not require him to discover Incumbrances.

An Exception being taken to the Answer, for that it did not discover any thing touching Incumbrances, it was Argued before my Lord; and for the Defendant it was alleged, That by the Course of the Court the time of the Discovery should be when the other Point was determined; for if that be for the Defendant, then no Discovery can be required; but if otherwise, that then the Defendant shall be put to answer Interrogatories, as is usual in Cases of like nature: And it cannot be Obiection, That the Estate may be charged with Incumbrances since the Bill, because they will be of no avail.

On the other side it was said, That this would create great delay; for upon the discovery of Incumbrances other parties must be made to the Bill, and therefore this Case differed from the Case of Account, which concerns the Defendant himself only; but the Question now is only for the making proper Parties.

The Court Ordered, That a further Answer should be made.

Nota, If a man devise, that such a Sum of Money shall be paid out of the Profits of his Lands, and the Profits will not amount to the Sum, in such case the Land may be sold.

Noell

Noell versus Robinson

The Plaintiff's Father, being seized in Fee of a Foreign Plantation, devised it to the Plaintiff, and made the Defendants Executors.

The Executors let it for years, reserving Rent in Trust for the Plaintiff, who now Exhibited his Bill to have his Rent.

The Defendant Confessed the Devise of the Testator, and the Lease made by himself; but said, That great Losses had fallen upon the Testator's Estate; and that he paid and secured (which is payment in Law) for the Debts of the Testator to great value, and that he hoped he should be permitted to reimburse himself by the receipt of this Rent; notwithstanding the mentioning of the Trust, as aforesaid.

The Cause came to Hearing; and the Court Decreed for the Plaintiff.

For altho' a Legatee shall refund against Creditors (if there be not Assets) and against Legatees, all which are to have their proportion where the Assets fall short; yet the Executors, himself, after his Assent, shall never bring the Legacy back: But if he had been sued and paid it by the Decree of this Court, the Legatee must have refunded; as if a Debtor to a Bankrupt pays him voluntarily, he must pay him over again. Otherwise of payment by Compulsion of Law.

Note, My Lord Chancellor said; That if they give Sentence for a Legacy in the Ecclesiastical Court, a Prohibition lies, unless they take Security to Refund.

Note also in this Case, that tho' it be an Inheritance, yet being in a Foreign Country 'tis looked upon as a Chattel to pay Debts, and a Testamentary thing.

It was Objected, That this could not be taken for an Assent; for if so, how could the Executor let it?

But the Court said, that it did tantamount to an Assent, and being a lawful Act a little matter will be taken for an Assent.

Anonymus.

A Bill was Exhibited by the Assignees of Commissioners of Bankrupts, to have an Account against the Defendant of the Bankrupt's Estate.

The Defendant pleaded, that he was but Servant to the Bankrupt, and had given an account of all to his Master; and likewise had been Examined before the Commissioners upon the whole Matter.

Upon

Upon Hearing this Plea, my Lord Chancellor Over-ruled it, and Ordered that he should Answer.

Anonymus.

If a man makes a Lease, or devise an Estate for Years (he being seised of an Estate of an Inheritance) for payment of Debts; if the Profits of the Lands surmount the Debt, all that remains shall go to the Heir, tho' not so express; and albeit it be in the case of an Executor.

Barney versus Tyfon.

The Case was thus:

The Plaintiff in the Life of his Father, being about 26 years of Age, and having occasion for Money, prevailed with the Defendant to let him have in Wares to the value of 400 L. and gives him Bond for 200 L. to be paid if he surmounted his Father (at which time an Estate would befall him of 5000 L. per Annum;) and he having surmounted his Father, he presented his Bill against the Defendant, to compel him to take his Principal Money and Interest.

And it was proven in the Case, that the Defendant was Informed at the time of this bargain, that the Father was ill, and not like to live, (and he did live but a year and half after) and that one Scissel, a man very infamous, was employed in the transaction of this Bargain.

And the Plaintiff obtained a Decree in the time of the Lord Chancellor Fynch.

And now upon a Petition to the Lord Keeper North the Defendant obtained a Re-hearing.

And in maintenance of the Decree it was alleged, that the hazard which was run was very little, and such Bargains with Heirs were much to be discountenanced.

The Lord Keeper affirmed the Decree; but said that he would not have it used as a Precedent for this Court to set aside mens Bargains.

But this Case having received a Determination, and the Defendant having accepted his Principal Money and Interest thereupon; and there being only a slight Omission in the Enrolment of the Decree (which if it had been done had prevented a Re-hearing) and the Defendant having delayed his Application to him by Petition, he would not now set the Decree aside.

Termino

Termino Paschæ, Anno 35 Car. II.

In Cancellaria.

Hodges *versus* Waddington.

The Case was thus:

An Executor wasted the Testator's Estate, and made his Will, wherein he devised divers of his own Goods, and made his Son Executor.

Afterwards a Suit was commenced against the Son, to bring him to an Account for the Estate of the first Testator, which was wasted; and pending that Suit the Son after the Will brought against him by the Legatee of his own Goods, delivered them to the Legatee, and assented to the Legacy.

After which, upon the Account against the Son, it appeared that the first Executor had wasted the Goods of the first Testator to such a value.

And then the party, at whose Suit the said Account was, and who was to have the benefit thereof, together with the Son and Executor of the first Executor, preferred a Bill against the Legatee of the Goods, to make him Refund, and obtained no Relief; especially for that he had made the Executor Plaintiff, who should not be admitted to undo his own Assent.

But liberty being given to bring a New Bill against the Legatee and the said Executor, the Cause came to Hearing, and it was Decreed, That the Legatee should Refund: So that one Legatee that is paid, shall not only Refund against another; but a Legatee shall Refund against a Creditor of the Testator, that can charge an Executor only in Equity, (viz.) Upon a wasting by the first Executor: But if an Executor pays a Debt upon a Simple Contract, there shall be no Refunding to a Creditor of an higher Nature.

Note also, The Principal Case went upon the Insolvency of the Executor.

Anonymus.

Anonymous.

A Bill was brought, setting forth a Deed of Settlement of Lands in Trust, and to compel the Defendant, who was a Trustee therein nominated, to execute the same.

The Defendant by Answer says, That he believed that there was such a Deed as in the said Bill is set forth, &c.

And upon the Hearing they would have read a Deed for the Plaintiff, tho' not proved; (but upon a Communion taken out only against another Defendant to the Bill) supposing it to be Confessed by the Answer.

But the Court would not permit the Reading of it; for the Confessing goes no further than what is set forth in the Bill, and will not warrant the Reading of a Deed produced, altho' it hath such Clauses in it.

Anonymous.

A Bill was preferred against one, to discover his Title, that A.B. might be let in to have Execution of a Judgment.

The Defendant pleaded, That he was a purchaser for a valuable Consideration; but did not set forth That he had no Notice of the Judgment.

And it was Over-ruled; for 'tis a fatal Fault in the plea.

Bird versus Blossie.

The Case was thus: One wrote a Letter signifying his Consent to the Marriage of his Daughter with J.S. and that he would give her 1500 l. And afterwards by another Letter upon a further Treaty concerning the Marriage, he went back from the Proposals of his Letter. And at some time after declared, That he would agree to what was propounded in his first Letter.

This Letter was held a sufficient Promise in Writing, within the Statute of 29 Car. 2. called the Statute against Frauds and Perjuries; and that the last Declaration had set the Terms in the first Letter up again.

Anonymous.

Where a man buys Land in anothers name, and pays Money; it will be in Trust for him that pays the Money, tho' no Deed declaring the Trust; for the Statute of 29 Car. 2. called the Statute of Frauds, doth not extend to Trusts, raised by Operation of the Law.

Q a v

Anonymous.

Anonymus.

A Defendant de bonis non of the Conules of a Statute had agreed with the Conules to assign it in Consideration of a Sum of Money which upon the said Agreement the Conules had consented to pay to him, his Executors or Administrators; and then the Administrator died.

The Court Deceit the Money to be paid to the Executors of the Administrator, and not to the Defendant Administrator de bonis non; altho' before the Execut it could not be assigned at Law.

Sed nota, That there were not Debts of the Defendant at the time of his death.

Termino Sancti Hillarij, Anno 35 & 36 Car. II.

In Cancellaria.

Note, Suits in Chancery admitted for Distribution of Incestates Estates upon the Act of 22 Car.

Sir Thomas Draper Mil' versus Dr. Crowther.

The Bill sets forth a Contract under Seal with the Defendant, for making of a Lease of certain Lands in Middlesex, and to have an Execution of the Agreement.

The Defendant pleads, That he was Head of a Colledge in Oxford; and sets forth the Charters of 14 R. 1. and 14 H. 2. Impowering the University to enquire and proceed in all Pleas and Quarrels in Law and Equity, except concerning Freehold, where a Scholar, their Servants and Ministers sunt una par-tium, &c. ita quod Justiciarij de Banco Regis sive de Comuni Banco, vel Justiciarij ad Assisas non se intromittant, &c. And the Confirmation by an Act of Parliament of the 13th of Elizabeth; and Concluded his Plea to the Jurisdiction of the Court.

And it came to be Argued before the Lord Keeper Guildford, 22 Febr. 1683; and the Plea was Overruled, because the Charter ought properly to be attended to a Pattern at Common Law only, as to Proceedings in Equity that might arise in such Cases, and not to meet Matters of Equity, which are Originally such, as to Execute Agreements in specie.

Again,

Again, Conuzance of Pleas is never to be allowed, unless the Inferior Jurisdiction can give Remedy. Here they can only Excommunicate or Imprison; but cannot proceed to Sequestration of Lands in Middlesex.

If the Matter lay only in Damages, it might be allowed to them, because the Jurisdiction is given over all England; but this is not to be intended where the Suit is for the thing it self, and when 'tis out of their reach.

A President was cited in the year 1663. before my Lord Clarendon Chancellor, assisted with Hale (then Chief Baron) and Justice Wyndam, where the Plea was Over-ruled. Vide in the 3 Cro. 63. Wilcocks and Bradell's Case, and Hallie's Case 87.

Sir Robert Reeve's Case.

Sir George Reeve, upon his Marriage with his Second Wife, settled a Joynture of divers of his Lands in Suffolk, which he had before charged with his Daughters Portion, (viz.) 3000 l. (which Daughter he had by a former Wife;) and by his last Will he mentioned, that the said Joynture Lands were so incumbered; and therefore he Devised certain Lands he had in Bickerton in Yorkshire to his Wife, in lieu of such part of the Suffolk Lands as were charged with the Portion, in case she would accept thereof.

But after his Decease it appeared, that the Lands in Bickerton were not equivalent in Value to the Suffolk Lands; and therefore she held to the latter, and was not prejudiced by the Charge of the Portion; because it appeared to be a Voluntary Settlement.

Nota, In this Case the Lord Keeper Decreed, that the Portion should be charged upon the Bickerton Lands, for so much as it was defeated by the Settlement in Joynture of the Suffolk Lands.

Anonymus.

One Devised his Lands to J. S. in fee, in Trust for Katharine—and the Heirs of her Body; and if Katharine died without Issue to Jane—for life: And in another Clause in the Will he devised, That if Katharine died without Issue, and Jane be then deceased; then, and not otherwise, he gave the Land to J. N. and his Heirs.

Katharine died without Issue, and Jane survived her and died.

A Bill was brought by J. N. against J. S. and the Heir at Law of the Testator, to have this Trust executed.

By Lord Keeper Deceed it for J. N. altho' Jane sur'vived Katharine; because the words (if Jane be then deceased) seemed to be put in to express his meaning, that Jane should be sure to have it for her life, and that J. N. should not have it till she were dead; and also to shew when J. N. should have it in possession.

Termino Paschæ, Anno 36 Car. II.

In Cancellaria.

William Ragget and his Wife *versus* William Clarke.

The Case was thus:

The Defendant was seized of a parcel of Land for his own life, and the lives of two others, and prevailed with the Defendant to be bound with him for a Sum of Money: And that the Defendant might raise Money for the discharge of the said Debt, he permitted the Defendant to enter into the said Lands, and to take the profits for two years, (the said Lands being about 12 l. yearly value;) and the said Land being so in the possession of the Defendant, the said Wheeler died, and made Isabel (Wife of the now Plaintiff) his Executrix.

And this Bill was brought by the said Husband and Wife, to have an account of the profits, and that the possession of the Land should be delivered up to them.

The Defendant by his Plea sets forth his Title as Occupant, and it was allowed. And the Bill was dismissed.

Bonham *versus* Newcomb.

One being seized in fee, in Consideration of 1000 l. paid to him by a Person that married his Widow, Conveys to him and his Heirs, and takes a Re-demise for 99 years, if he should live so long: And a Covenant therein, That if he should pay 1000 l. (with the Interest that should be due for the same) at any time during his life, that the Grantor should Re-convey to him and his Heirs, and that if he did not pay the Money, then that his Heirs, &c. should have no power to Redeem.

He died, the Money not being paid, and his Heir preferred a Bill to Redeem it.

And

And it was urged for him, That in a Conveyance, which was a Security for Money, whatever Covenant there was therein to exclude from Redemption such Covenant would not be regarded in this Court, and that the Person to whom the Conveyance was made might have had a Bill in the life time of him that Conveyed, to have a time set for the payment of the Money, or otherwise to be foreclosed.

But my Lord Keeper dismissed the Bill; for, he said, in a common Mortgage such Covenant, to restrain Redemption, should not be regarded; but this was made with an Intention of a Settlement of his Estate, besides the Consideration of the Money paid. And he denied that he could have been, by the Decree of this Court, limited to any time for payment of the Money; for this Court cannot shorten the time that is given by express Covenant and Agreement of the parties; but when that time is past, then the Practice is to foreclose.

Nota, This Dismission was afterwards in the Parliament, held 1 & 2 W. & M. affirmed.

Nota, If a man makes a Voluntary Conveyance, and there be a defect in it, so as it cannot operate at Law, this Court will not Decree an Execution thereof: But sometimes it has been Decreed, where it is intended a provision for younger Children.

The Lord Salisbury's Case.

M^r Lord Salisbury married the Daughter of one Benner, who had two Daughters, and bequeathed by his Will to each of them 20000*l*. provided, that if they, or either of them married before the Age of sixteen, or if that the Marriage were without the Consent of such persons, that they should lose 10000*l*. of the Portion, and that the 10000*l*. should go to his other Children.

The Case was thus:

The Lord Salisbury married with one of the Daughters under the Age of 16. but with the Consent of all the parties.

It was urged, That it being with Consent, it might be at any Age.

But my Lord Keeper was of Opinion, that both parties must be observed.

Anonymus.

I^f a Covenant to stand seized to the use of A. for life, and after to two equally to be divided, and to their Heirs and Assigns for ever.

My Lord Keeper declared his Opinion, that the Inheritance was in Common, as well as the Estate for life. He said, that it had been

been held that where the words were (to two equally divided) that should be in Common; otherwise if the words were (equally to be divided); but since taken to be all one. Nay, a Devise to two equally will be in Common. Here there shall not be such a Construction as to make one kind of Estate for life, and another of the Inheritance; and Survivorship is not favoured in prejudice of an Heir.

Note, That if a Bill be Exhibited for the Examining of Witnesses in perpetuum rei memoriam, if the Plaintiff therein prays Relief, the Bill shall be dismissed.

Termino Paschæ, Anno 1 Jac. II.

In Cancellaria.

The Lord Pawlett's Case.

The Lord Pawlett had made a Settlement of his Estate, and had by the Deed charged his Lands with the payment of 4000 l. apiece, to be paid to his two Daughters, at their respective Ages of 21 years, or days of Marriage; and reserved to himself a Power of otherwise ordering it by his Will.

And by his Will in Writing made at the same time, or within a day after, devised by these words, (viz.) I give and bequeath to my two Daughters by name 4000 l. apiece, to be respectively paid unto them for their Portions, in such manner as I have provided by the said Settlement; and mentioned, that he would be understood to mean only one 4000 l. to each of his said Daughters, and appointed to each of the Daughters 100 l. per annum for Maintenance.

It hapned one of the Daughters died before Marriage or the Age of 21 years; and my Lady Pawlett (the Mother of the Daughters) took out Letters of Administration to the Daughter that died, and preferred a Bill against the Trustees for the 4000 l. and the Heir, to whom the benefit of the Lands after the Money raised was appointed.

The Question solely was, Whether this Money should go to the Administratrix, or the Land be discharged thereof, and accrue to the benefit of the Heir?

It was agreed on all hands, that if this had been a Legacy, or a Sum of Money bequeathed by the Will, altho' the party had died before the Age of 21 or Marriage, the Administrator should have had it; and that is the Practice in the Ecclesiastical Court in case of Legacies. The Legatee in such case is taken to have a present Interest, tho' the time of payment be future.

My Lord Keeper mentioned the Reason to be, because it Charges the Personal Estate which is in being at the time of the Testator's death, and if the Legacy should by such an accident be discharged, it would turn to the benefit of the Executors, whereas the Testator did not probably so intend it: And further it has been Ruled, That altho a Sum of Money be devised out of Lands to be so paid at a future day, the Death of the Legatee doth not lose it. Tho my Lord Keeper did not seem satisfied with the Reason of that Case, but it having been so Decreed it was not good to vary, to avoid Arbitrariness and Uncertainties.

But here this Sum of Money is appointed to be paid by the Deed, and is a Trust charged upon Lands, and Trusts are governed by the Intention of the Party, and that the Personal Estate is not Charged, and this Sum of Money doth not lie in demand by a Suit, as where a Legacy is devised; but only a Bill may be preferred, to have the Trusts performed.

And tho' it was much insisted on for the Plaintiff, that here the Will requires this Money; yet that refers to the Deed, and orders it to be paid in such manner as was thereby appointed.

And it was said to be the same with the Case of Bond and Richardson, which was lately by my Lord Keeper thus Decreed, being a Sum of Money charged to be paid out of Land at such an Age. If a Settlement were made, and Lands charged with such Sums of Money as a Will should declare, there the Will would be but Declarative, and not Operative.

Termo Sanctorum Hillarij, Anno 1 & 2 Jac. II.

In Cancellaria.

Francis Whitmore Vid Plaintiff, *versus* Weld & al, Defendants.

The Case, as it was drawn up upon Reference thereof by my Lord Keeper to the Judges of the Common Pleas for their Opinion, was thus: (Viz.)

On the 18th of January 1675. William Whitmore the Elder taking notice that he had settled the major part of his Lands by Deed, and being possessed of a very great Personal Estate in Mortgages, Jewels, Plate, Bonds and other Goods and Chattels, amounting in the whole to a very great Sum by Will in Writing devised several Legacies; and after Wills in this manner: (Viz.)

The surplusage of my Personal Estate (my Debts, Legacies and Funeral Charges being paid and satisfied) I give unto the Right Honourable William Earl of Craven, for the use of my only Son William

Whitmore

Whitmore and his Heirs lawfully descended from his Body and for the use of the Issue Male and Issue Female descended from the Body of my Sister *Elizabeth Weld*, deceased, *Margaret Kemes* and *Anne Robinson*, in case that my only Son *William Whitmore* should decease in his Minority, without Issue lawfully descended from his Body. I nominate and appoint my only Son *William Whitmore* Executor of my last Will and Testament. I nominate and appoint the Right Honourable *William Earl of Craven*, during the Minority of my only Son *William Whitmore*, Executor of my last Will and Testament. I commit the Education and Tuition of my only Son *William Whitmore* unto the Care of the Right Honourable the Earl of *Craven*.

On the 5th of August 1678. the Testator died, his Son being then about the Age of 13 years. The Earl of *Craven* proved the Will.

William Whitmore the Son made his Will in Writing; and thereby Devised to *Frances* his Wife all his Estate real and personal, and makes her sole Executrix, and about the 2d of August died without Issue, being above the Age of 18 years, and under the Age of 21 years, not having proved his Father's Will.

The Will of *William Whitmore* the elder, is duly proved by *Frances*.

The Question was, Whether *Frances Whitmore* the Executrix of *William Whitmore* the Son, be well Entitled to the surplusage of the Personal Estate of *William Whitmore* the Father, or the Descendants of the Sisters?

Upon hearing of this Cause a Case was made ut ante, and referred by the late Lord Keeper North to the Judges of the Common Pleas, who were divided in Opinion, but made no Certificate thereof, (the Reference being determined by his Death.)

And afterwards by Order it came to be heard before the Lord Chancellor *Jefferies*, who upon Hearing of the Counsel of both sides, Decreed it for *Frances Whitmore* the Complainant; so that the Executorship of my Lord *Craven* determined at the Age of 17 years of *William Whitmore* the Son, and then the Surplusage became an Interest vested in him, and could not be devised over: And his Lordship seemed to be of Opinion, That Minority in the Clause wherein the Devise over was, should be understood to determine at the same time, as in the Clause of Executorship.

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Late One of the Juſtices of the Court of Common-
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*S^r Peyton Ventris Kn^t.
Late one of the Justices of the Court
of Common Pleas.*

Francis T H E Hargrave.
REPORTS

O F
Sir Peyton Ventris K^t.
Late One of the JUSTICES of the
COMMON-PLEAS.

In Two Parts.

The First PART

Containing Select **CASES** Adjudged in the
Kings-Bench, in the Reign of K. **CHARLES II.**

W I T H

Three Learned **ARGUMENTS**, One in the **Kings-Bench**,
by Sir *Francis North*, when Attorney General; and Two in the **Exchequer**,
by Sir *Matthew Hale*, when Lord Chief Baron.

With Two **TABLES**; One of the Cases, the other of the Principal Matters.

The Second PART

Containing choice **CASES** Adjudged in the **Common-Pleas**,
in the Reigns of K. **CHARLES II.** and K. **JAMES II.** and in the Three first
years of the Reign of His now Majesty K. **WILLIAM** and the late **Q. MARY**;
while he was **JUDGE** in the said Court: With the Pleadings to the same.

A L S O

Several **CASES** and **PLEADINGS** thereupon in the **Exchequer-Chamber**
upon Writs of **E R R O R** from the **Kings-Bench**.

Together with many remarkable and curious Cases in the Court of **Chancery**.

Whereto are added

Three exact **TABLES**; One of the Cases, the other of the Principal Matters,
and the third of the Pleadings.

With the Allowance and Approbation of the Lord Keeper and all the Judges.

L O N D O N:

Printed by the Assigns of *Richard and Edward Atkyns*, Esquires; for
Charles Harper at the *Flower-de-Luce*, and *Jacob Conson* at the *Judges-Head*, both over against *St. Dunstan's Church* in *Fleetstreet*, MDCXCVI.

REPORTS

Sir Peyton Venetian

COMMON-PLEAS

In Cases



Containing Select
Things

Three learned ARGUMENTS One in the King's Bench
by Sir Francis Bacon, Attorney General, and a great many
by Sir William Walsley, when Lord Chief Justice
With Two TABLES; One of the Cases, and the other of the Words

The Second Part
Containing choice CASES Argued in the Common-Pleas
in the Reign of R. CHARLES the First, and Second, and
years of the reign of the now Majesty R. CHARLES the Second
while he was a DUKE in the said Court: With the Reasons
A. D. 1640.

Several CASES and REASONS thereupon by Sir Francis Bacon
Esq. when Lord Chief Justice, and Sir William Walsley
Together with many other learned and choice CASES
Three TABLES; One of the Cases, and the other of the Words
and the third of the Reasons

With the Abbreviation and Synopses of the Lord Bacon's Reports

Printed by the Author at the Sign of the Anchor, in the Strand
Charles Barker at the Sign of the Anchor, in the Strand
Also, both over against the Sign of the Anchor, in the Strand

THE
FIRST PART
OF THE
REPORTS
OF
Sir Peyton Ventriss K^t.
L A T E
One of the Justices
OF THE
COMMON-PLEAS.

CONTAINING
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TO THE
R E A D E R.

TH E Name of the Reverend and Learned J U D G E, who was the Compiler of these R E P O R T S, will be a sufficient Invitation to the Understanding Reader, not only to cast his Eye upon ; but seriously to peruse them.

And as my Lord Coke in his *Commentary upon Littleton* (fol. 249. b.) says, That for the most part the latter Resolutions and Judgments are the surest ; and therefore best to Season Students with at the Beginning, both for the settling of their Judgments, and retaining of them in Memory, and easier to be understood than the Ancient : So it is to be hoped that these following R E P O R T S, Collected with Care, Diligence and Experience, by the Learned Author thereof, will fully answer these Directions given by that before-mentioned Famous Lawyer.

To the Reader.

The Author of these *REPORTS* was so Eminent in his Profession of the *LAWS*, that should I presume to give a Character of him, it would come very short of His great Worth; and therefore I shall only commend him to the Courteous Reader, where he will find his own Character given by himself.

Vale.

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ADVERTISEMENT.

Note, That the Author of these Reports, has refer'd to *Croke's Elizabeth* as the first Part, and *Croke's Charles* as the third Part of those Reports, except in the first thirty Sheets of the First Volume, in which thirty Sheets he refer'd to *Croke's Charles* of the first Edition as the first Part, and *Croke's Elizabeth* as the third Part of those Reports.

Term.

Suffil's Case.

It was Moved to quash the Return of a Rescous against Suffil and others others, who rescued a person taken upon Mesne Process; because the Rescuers being particularly named 'tis said rescusserunt, and not added quilibet eorum rescussit. And for that a Case was cited in the 2 Cro. where the Sheriff returns an Exigent against others quod non comperuerunt, upon the Quinto exacti, and doth not add nec aliquis eorum comperuit; and for that cause it was Reversed in a Writ of Error, notwithstanding, Twisden being only in Court, held it to be well enough, it being in the Affirmative.

Anonymus.

A Prohibition was prayed to the Ecclesiastical Court, for that a Parson Libelled against one there for calling of him Knave; and 'twas granted, it not appearing to relate to any thing concerning his function: And a Case was cited to be Adjudged 24 of the Queen, the Suit being in the Ecclesiastical Court for these words, (viz.) Sir Priest, you are a Knave; and a Prohibition was granted.

Note, If a man be taken in Execution, he cannot be bailed, tho' he brings a Writ of Error.

Anonymus.

In Debt upon a Lease for years, the Defendant may plead Entry into part, upon which follows Suspension, and it doth not amount to the General Issue.

Heely versus Ward.

Error to Reverse a Judgment given in the Court at Hull, where the Plaintiff in an Assumpsit did declare, That at such a place, infra Jurisdictionem Curiae, the Defendant in consideration that the Plaintiff had assumed to pay him so much a yard, promised to deliver him so many yards of Kersey; and it was assigned for Error, That the delivery is not laid to be at a place infra Jurisdictionem Curiae; and indeed there is no place at all. And of that Opinion was Twisden, (he being only in Court) and cited a Case, where in an Assumpsit in the Marshalsey, upon a Promise to make a Lease of a House in Middle Row, and after Judgment it was held Erroneous, because Middle Row was not laid to be infra Jurisdictionem Curiae.

The

The Bishop of *Lincoln* versus Smith.

The Bishop of Lincoln sued in the Court holden before his Chancellor for a Pension, to which he intitled himself by Prescription, and a Prohibition was prayed for Smith the Defendant there; for that being by Prescription that Court had no cognisance of it: And for that my Lord Coke's Opinion was cited, 2 Inst. 491. especially he could not sue for it in his own Court.

But it was resolved by Keeling and Twisden (the other Justices being absent) that Pensions, tho' they were by Prescription, might be sued for in that Court; for having cognisance of the Principal, that shall draw in the Accessory. As if one Libel for a Modus decimandi, if they allow it, they may try it; and Coke's Opinion they said was not warranted by the Books, and Fitzh. N.B. 524. is against it, and the Court being held before the Chancellor, and not the Bishop himself, he might sue there: Vide Hob. 87. Conusans of Pleas granted to be holden before the Steward of the Gantee, licet the Gantee fuerit pars. 2 Cro. 483.

Anonymus.

An Attachment was prayed against one, who being arrested upon a Latitar, gave a Warrant of Attorney to Confess a Judgment, and presently after snatched it out of his hand to whom it was delivered, and tore off the Seal: And the Court seemed to incline, in regard it was to Confess a Judgment in this Court that it was a Contempt, upon which an Attachment might be granted.

Anonymus.

A Prohibition was prayed, to stay a Suit in the Court Christian for Tythes, upon the suggestion of a Modus, which was alleged in this manner: That the Proprietors and Occupiers of such a Mannor, or any parcel thereof, should pay a Groat to the Parson for Herbage Tythes.

The Court held this could not be, for if a man had but two or three foot of Ground in the Mannor he should pay a Groat; but it ought to have been said: That the Proprietors and Occupiers of such a Mannor, for themselves and their Farmers, had paid Four pence.

Twisleton versus Hobbs,

Action for these Words, [You are a Forger of Bonds, a Publisher of Forgery, and Sue upon forged Bonds.]

The Jury found the Defendant Not Guilty, as to the first Words, and resolved the last Words were not Actionable, it not being laid that he knew of the Forgery.

B 2

Sir

the nature of the Usage; and therefore in the Case at Bar, the Usage being several, and the Estates several, the Prescription ought to be several also.

It is impossible to raise such an Interest by a Grant at this day; for if such a Grant were now made, either the Grantees would be Joyn tenants of this Interest, and then there would be a Survivorship; or else they would be Tenants in Common of it; and their several Interests might be annexed to their several Estates by Purparties or Apportionment: And so it would be in the nature of several Grants; and there must be to several Prescriptions several Men that have had Land time out of mind, yet cannot joyn in making Title, but must make it severally. As for Example:

If there be Three, one of them must say, That his Father was seised of a Third part that descended to him, and so make a Title against a Stranger, tho' there be a joyn Possession: And if he be to make a Title against his Companions, he may say, That he and all those whose Estates they have in the other Two parts; they cannot say, That their three Fathers were seised of the Lands, and shew the several Descents; nor, That they Two, and all whose Estates they have in Two parts in Three to be divided, have held in Common.

For the Title of the one concerns not the other; they are upon Lines and Descents; and Prescription is making of a Title, as was said before; and the Law is as strict in it, or rather more strict, than in making of a Title to Land.

Therefore several Men that have several Estates, and no Relation one to another, cannot joyn in making a Prescription; for the Prescription of one does not concern the other.

Rastal's Entries 622. d. *en Trespass*, &c. Two Commoners (to avoid plurality and repetition) do, as near as they can, joyn in a Prescription; but being considered, it is a several Prescription, as much as if they had Justified severally.

By Lord Coke's Rule on Littleton 197. a. That Tenants in Common may joyn in an Assize for an entire thing, as an Hawk, or an Horse for the necessity of the case. It may be objected, that there is the same necessity here, I Answer,

That tho' in that case they joyn in the Demand and the Action, yet they must make their Titles severally as they are, they must Sue as they may Recover, which cannot be half an Hawk, or half an Horse; but when they come to make their Titles in Pleading, they must set them forth distinct; there the possession is joyn and cannot be severed; but in our case the possessions are several, and one hath nothing to do with the other, and the thing claimed is in its nature severable, either by Moieties, Purparties or Apportionment.

It may be Objected against my Rule, That a Prescription must be as a Grant may at this day be made, that (11 / 7. 13. 14) a man may prescribe against a great many as Tenants, or a Commonalty, without naming a party certain; and such a Prescription cannot spring out of one Grant no more than this. For if a great many may joyn in one Grant, yet it is so many several Grants as to their several Interests; and so it may be said, there ought to be so many several Prescriptions.

I Answer, The Rules are not alike: For if 100 Men, bring a Generality (as all the Tenants of the Manor of Dale) make the same kind of Grant to J.S. or there be the same kind of Reservation, and the thing claimed be annexable to the Estate of J.S. these all unite in the Grantee and his Estate, and the Estate continues entire, Time knits and unites it, and an entire Prescription will serve, being it will serve the Case.

But when a Grant is made from one to many that have several Estates, their Estates are carried and descended several ways, and Time and Usage makes them distinct and several, and cannot be served by the same Prescription.

But the Prescription at Bar is worse upon my Second Reason; for Prescription and Custom are of contrary Natures and incompatible, and cannot give being to the same thing.

Prescription is a Title presuming a Grant to the Freeholders and a Lawful beginning. The Copyholders claim by Custom, because they are but Tenants at Will and not capable of a Grant; then this must be raised from the Lord by parcels, which being an Entire thing it cannot be: For which soever should be raised first, the rest must be left in the Lord, who cannot have a Right of sole Pasturage in his own Soil distinct from the Soil.

It may be Objected here, That Custom and Prescription are not of such contrary Natures as I make them; for in *Day and Savage's Case* in *Hob.* 85. the Pleadings were as a Custom of the City, and the Court Adjudged it to be a *Prescription*; which shews, that *Custom* and *Prescription* differ not so much in the nature of the Thing, as in the manner of the Pleading.

For Answer, I need but observe the Nature of that Case. The Officers of the City of London Justified for a Duty of Wharfage claimed by the City. The Plaintiff sets forth in his Replication, That within the City there is a Custom for all Freemen to be Discharged, &c. and the Question was, Whether this was a Custom to be tried by the Mouth of the Recorder, or a Prescription to be tried *per Pais*? It was held to be in its Nature, a Prescription; and if it were not, that it was Adjudged that it ought not to be tried by their Certificate who were concerned in Interest.

The Prescription there meant by the Court, was not a Prescription to claim a real Interest, as in this Case; but it was (as I may call it) a local Prescription to privilege Persons in a certain Place and Condition, which is in its Nature betwixt a Prescription and a Custom; and not a Custom, because it concerns the Discharge of persons. And it is not merely Local, nor a Prescription; because it is not annexed to any Estate nor to any Person; but in relation to a certain Place and Condition. And yet it is rather termed a Prescription; for it is said, That Inhabitants may prescribe for an Easement or a Discharge; but a strict Prescription to make Title to a Real Interest is so nice, that it cannot be pleaded by way of Custom, nor confounded with it. Inhabitants, or Freemen, or Citizens cannot prescribe in that kind.

I must add to strengthen my Reasons upon these two Matters, that no Precedent can be shewn in all our Books of any such Case, either where two Freeholders join to claim a Real Interest in solo alieno, or where Prescription and Custom are mixed, as in this Case.

It will be no Objection that it cannot be pleaded better when it appears the very thing cannot consist with the Principles of Law; for tho' there be such a thing as several Pasture, and frequent, which may be appurtenant to a Messuage, yet it cannot be annexed to the Estates of so many several Freeholders and Copyholders: But if the thing were consistent with Principles of Law, the Pleading here is naught to mix a Prescription and a Custom together, which are incompatible.

The whole ought to have been laid by way of Custom, it being an Entire thing, and the necessity of the Case would have maintained it.

If J.S. makes a Feoffment to the use of the Feoffee and Feoffor and their Heirs, one cannot be in by the Common Law and another by the Statute of Uses; but both shall be in by the Statute of Uses. So here, the Entire thing not being to be maintained, possibly both Prescription and Custom should have been laid by way of Custom; for the Freeholders in case of Necessity (it may be) might claim by Custom, tho' the Copyholders could not prescribe.

Thirdly, My third Reason is, because the Owner of the Soil can by no Prescription or Custom be excluded out of his own Soil at all times of the year. And this Reason I principally depend on, because it strikes at the very Root and Essence of the thing.

I know there are many Cases in our Books of Usages, that have been allowed in restraint of the Owner of the Soil; I shall not oppose any one of them, but admit them all; yet oppose this Prescription,

Prescription of which I may confidently say, there is not one Precedent in all our Books.

I will admit the Lord or Owner may be excluded for a certain time, according to the Books, Fitzh. tit. Prescription 51. Huttons Rep. 45. Pitt and Cheekes Case, and the same Case 6 Co. by the name of Sparks Case, and Co. on Litt. 122. a. where he says, a Man may prescribe to have solam vesturam, from such a day to such a day, and thereby the Owner of the Soil may be excluded from Feeding there, so he may prescribe to have Separa^l pasturam, and exclude the Owner of the Soil from Feeding there. *

I know that they object, that my Lord Co. is to be understood as to Separa^l pastur^l, that it may be at all times in the year, because he does not restrain it as he does the solam pasturam. But certainly the Law is the same for the one as for the other, and the Books must be intended for the one as well as for the other, for coming immediately next, there needed no Repetition for the latter, but the (so) signifies in the same manner, and so understood I admit it.

I admit the Lord or Owner may be stinted as to his kind of Cattel; and have none but Sheep or Horses, and so he may be stinted to a certain number, according to Kenwick and Pargiters Case. Yel. 129. 2 Cro. 208.

I admit the Lord or Owner may be excluded as to some kind of profits: An other Man may prescribe to have omnes Spinās upon such a Wast, according to Dowglass and Kendals Case, Yel. 187. 2 Cro. 256.

And for this Reason, a Man may prescribe to have solam piscariam upon anothers Soil, for there he leaves the Owner the profits of the Soil for Hawking of his Ground or Ballastage, which the Owner has besides the Property and the use of the Water, so that he leaves enough for the subsistence of the Fish.

Now, I shall agree further, that the Lord may be excluded wholly from the feeding of his Ground, upon Special Matter shewn to the Court, whereby it may appear that the Lord has some recompence, or takes the profits some other way; as if there be a Park or Forrest where the Lord has the Game, an other Man may prescribe to have the Herbage, for the Lord has considerable profits of the Ground by his Deer, which is so considerable, that if the Franchise come to be determined, it hath been held that such a Prescription for Herbage being but surplusage after the feeding of the Deer and subordinate to it, shall rather be lost than carry the whole profit of the feeding and exclude the Owner. And it has been the Case of many Parks, that have been disparked by the King, after the Herbage granted away; so if there be Mines opened, or any other profit, that appears to the Court to be left to the Owner.

I

I do not oppose, but that the pasturage may be claimed by prescription.

But to have the Sole pasturage of all Pasture Grounds at all times in the year, is to have the whole profit of the Ground, and the Owner is wholly excluded, which would be very unreasonable. I shall agree yet further, that upon a Special Case shewn to the Court in the Pleading, the Lord may be excluded from any permanency of profit in his own Soil, as putting this Case, a Lord hath improved so much of his Wastes as that he has left, but just sufficient for his Common Feeding in such Case the Lord ought to be excluded of Feeding; but this must be shewn in Pleading, according to my Lord Coke's Opinion, in Kenwick and Pargiters Case, which is well reported in Brownlow 2 part 64, 65. And in all reason there must be Special Pleading in such Case, for where a Prescription or Custom is reasonable only upon Special Matter or Circumstance, that Special Matter or Circumstance must be shewn to the Court, by him that would have the advantage of the Prescription, for the Negative cannot be averred on the other side.

And it cannot be helped, by supposing there may be Trees, Mines or Park, but it ought to be shewn; for every thing that depends upon supposition, may as well not be as be, and to allow a Prescription upon such a supposal, would be to bind up a party by it tho' the thing be not; and Pasturage may well be supposed, the whole profit of Pasture Ground, for it is so in fact in many places, and has its name, because it is fed all the year. But where it is fed but part of the year, and mowed or plowed the rest, it is called Arable or Meadow.

The main Objection that I conceive they can make to this is, That the Sole Pasturage or Vesture lies in Grant, and the Owner may exclude himself wholly by Grant, and so he may be excluded by Prescription or Custom; and this they ground upon Co. Litt. 4, b. where it is said, if a Man Grants to another, and his Heirs vesturam terræ, and makes Libery secundum formam Chartæ; yet the Freehold of the Soil shall not pass; by which it is implied, that the Vesture shall.

If this Book be to be understood of the Vesture at all times of the year, where no other profits remain to the Lord, I shall crave leave to object against it from the same Page, where it is agreed, that if it were profits, the Soil would pass.

Yet thinks it should be the same in reason, where the Vesture is all the profits, and Vesture shall be intended all the profits. I shall cite some Authorities, which are not inconsiderable to Warrant this Opinion.

I have in a Manuscript Report of Cases in King James's time, a Case betwixt Collins and the Bishop of Oxford; It was Paschæ 19. Jacobi upon a Tryal at Bar, in the Kings Bench. The Case was, that 1 Ed. 6. the King erected the Bishoprick of Oxford, and gave to the Bishop and his Successors, int' al' primam vesturam of a Meadow called Horse Meadow. John Bridge Bishop of Oxford leased it for three Lives, tending Rent, and dies; his Successors before restitution of the Temporalities accepted the Rent of the Lessee, and afterwards entered upon him. Upon this Case the first question was, what passed by the Grant of prima vestura.

My Report says, That it was agreed by all the Justices, that by a Grant of Vestura Terræ by a common Person the Soil will pass, and then there must be a Livery of consequence; but they held a Grant of prima vestura, was but like a Grant of prima consura, and being for no certain time, is but an Interest in the first cutting, or taking of the Grass. But they all agreed, that if a Man Grants primam vesturam, from such a day to such a day certain, the Grantee shall have the Soil and Mow it, or feed it as he pleases.

Kelway 118. If a Man Grants vesturam Terræ for term of Life to another, it is a Grant of the Land for Life; for saith the Book; the vesture is the profit of the Land, and it is all one to have the profit as to have the Land it self. Littleton puts the Case, if a Man Grants the Vesture of Land to another and his Heirs, without Livery, no Estate passeth.

But the Book of my Lord Cokes difference, betwixt the Vesture of the Land, and the profits of the Land seems to be mistaken, and in reason they are the same; for I take it generally speaking Vesture shall be intended all the profits, and if there be special profits, as Mines opened, or Waters, &c. which may qualify the word, and retain the Soil to the Owner, it must be shewn.

And as it is for Vesture of Land, so I conceive where it appears in Pleading that the Ground is Pasture. Pasturage or Sole Feeding will signifie all the profits; for Pasture is properly that which is wholly for Feeding; and where the Sole Pasture is claimed, the Owner cannot claim, or take any other profit.

Temps E. 1. tit. Partition 21. Two Men agree to make partition of Pasture Ground in this manner; That one shall have totam pasturam, from such a time to such a time, and the other for the residue of the year; this is a partition of the Soil it self, which shews Pasture is to be intended the whole profits of Pasture Ground; in that case the quo jure could not be maintained; for the party had not barely a Liberty, but the Soil it self.

If several Men have Profits upon the same Land, alternis vicibus, the Law most commonly determines the right of the Soil to be in him, that has the most considerable Profits. As for Example.

If one has the Summer Feeding of Pasture, or the first Tonsure of Meadow, or the Sowing and Reaping of Corn upon Arable, and another Man has the Feeding separately at other times of the year; the Law saith, that the Soil is in him that has the Summer profits and Corn, because it is the greater Profits, and the other hath but a Profit a prender.

Now, suppose that two Men have interchangeably the sole Feeding of Pasture at such times, that the Interest of one is in all respects equal to that of the other, there nothing can determine the Soil to be in one more than the other; and therefore it shall be in one for his time, and in the other for his time. But where one has the sole feeding of Pasture at all times in the year, and it has been so time out of mind, and there is nothing but Pasture, what can the other have to shew the Soil to be in him, and why should it not be said to be in him that has the feeding or whole Profits? It seems very absurd, that a Man should be allowed to be Owner of the Soil, and yet it may be has no badge of Ownership by Perception of Profits. If the Mans Estate be displaced so as to be put to a Writ of Right, how could he lay the Esplees?

And as to this Consideration there may be difference betwixt a Grant and Usage, for a Grant beginning within time of Memory, the Ownership of the Soil was once fully manifested, until he had divested himself of all but that; but upon Usage time out of mind nothing can be said, why one Man should have the Soil more than another if it be not in him that hath all the Profits.

I must end this Point also with this Observation, That if there is no Case in all the Books of a Sole Pasture at all times of the year, but in F. N. tit. Prescription 51 and 55, and Hutton 35. It is made a Profit a prender, and the most considerable Profits are left to the Owner.

My fourth Reason upon which I hold this Prescription is void, is, because it is a new invention framed to overthrow a Maxim in Law, and is of mischievous consequence.

New inventions that are agreeable to Rules of Law, I know have been always received, and sometimes have proved of excellent use. But New inventions that are framed to supplant Principles of Law, have been always baffled and rejected.

The Maxim and Principle of Law that is overturned by this way of Pleading is, That a Commoner cannot prescribe to exclude his Lord.

This

This Maxim is one of the foundations of Law, and depends upon the reason of the thing, and not upon the sound of the word.

It will be objected, that the reason is, because ex vi termini the word Common implies that they are to Common with the Lord, which they cannot do if the Lord does not feed.

But I conceive it is not so, for it may be as well called a Common, without a Solecism, where the Tenants feed in common together, and the Lord never feeds with them, as where he does; the true reason is from the nature of the thing, for it is supposed the Lord has no need of his Waste, and to make non-usage in such a case turn to a Prescription or Custom against him, would be most unreasonable.

Upon the creation of Mannors, the Lords took as much as was for their own Use into their Demesns, they distributed as much as was convenient amongst their Tenants; what was left was called the Lords Waste, which was neglected by the Lord, because he had before taken into his Demesns what he had need of.

It were very hard, that non-usage should turn to a Prescription against the Lord, because he doth not feed his Wastes, when he left them waste before, because he had taken as much before as he had occasion to feed.

It is upon the same reason that the Law will not allow any Prescription for Commoners to exclude, and not upon any Argument from the word Common. Maxims in Law do not depend upon words, but upon foundations of reason; it is not for the honour of the Law that it should have its Maxims depend upon sounds and words, and not upon solid reason.

That Commoners cannot prescribe to exclude their Lords if they call their Right by the term of Common; but if they call it by another name, tho' they claim the same kind of interest, they may exclude them.

If you prescribe to have Communiam excludendo Dom' that is not good; but if you prescribe to have solam & separalem Pastur' in common amongst your selves for Beasts Levant and Couchant, you may exclude him.

Under colour, to have such a Maxim turned out of Doors and made useless, there ought to be very good Authority for it; such an Invention ought to be examined by strict Rules.

And the consequence of this Innovation will be great and general, for there is no Common in England, but this Plea will serve, for if the Jury will find it; and it is found by experience, that many times, though the Lord of the Mannor gives very good Evidence, a Jury will find against him; and if a Lord cannot prove an actual feeding, a Jury will certainly incline to find it, let the Court direct what they please.

The King and great Lords, that have large Wastes, that lie rentfree from their care, seldom made any benefit by seeding; and they must not expect hereafter to make any improvements, if this pleading be allowed, which will be very mischievous; whereas, if that Maxim of Law were observed, and such an unreasonable Claim disallowed in Pleading, it will not be in the power of Juries to exclude Lords out of their own Wastes.

I conceive, in this Case, upon the matter disclosed, in pleading, the Court may discern judicially, that this is but an Innovation, and an Artifice to disguise a Common, and to call it a Sole-pasture to enable the Commoners to prescribe to exclude the Lord, which they cannot directly do by the Rules of Law.

Here first, The Soil is the Lords of the Mannor, and a parcel of the Mannor, and a large quantity in truth 10000 Acres, tho' the place assigned is but 100 Acres.

All the Free-holders and Copy-holders of ancient Houses, or parcel of the Mannor, are to feed and not to be excluded, and in truth of 3, or 4 Messuages in the Town.

'Tis for Beasts Levant and Couchant, 'tis with an exception of Hogs, Sheep and Northern Steers, which is like the regulation of Common; if it were a Sole-pasture they might have put in what Cattle they pleased, for it is all one to the Lord, who is to be wholly excluded.

The Court may discern by all these Badges, that it is in its nature but a Common, by Art put into other words to oust the Lord.

I shall now crave leave to offer to the view of the Court the Consequences and Inconveniences of this Prescription.

1. If there be a Surplusage at any time, the Lord cannot improve nor feed, but it must be lost, which is against the Publick Good.

2. If a Stranger seeds and does a Petit Trespass; as it is called in Robert Maries Case, 9 Co. the Lord can have no Action for the seeding, but the Tenants must, and then they must either joyn or sever; if they joyn, what a number of Plaintiffs will there be, and how shall the same recovered be divided in Equity, or the Contribution for the Costs? If they sever, and be non-suit; then there will be as many several Actions, which will be vexatious, according to Robert Maries Case.

3. If a Freehold be purchased by the Lord, or Escheat, or a Copyhold Estate be determined, what is become then of the Share of the Sole seeding? The Lord cannot joyn with them in the Prescription; shall he have no benefit of the Soil?

If so, what if all but one fail, shall that one have all ?
If on the contrary, the Lord shall feed, must he do it as the Owner of the Soil, and have the Surplusage ? for the Levancy and Couchancy, is not material among themselves. And then they would become as Commoners again ; and this would be a strange Prescription, that cannot be maintained if ever there were any Escheat of any Tenancy into the Lords hands.

4. But the greatest mischief of all will be, that this will be a ready way to enable Tenants to withstand all Improvements. In Gatewards Case, 6 Co. 60. it was a great reason against a Prescription, that it was inconsistent with any improvement ; it would be a great mischief to this Kingdom where there are large Wastes and Commons, Forrests and Fens, to take away all power of improving them ; for the same Land by improvement becomes able to support a great number of people which are the strength of the Kingdom.

And as there are great inconveniences on this side, so the other way there will be none at all, for they may enjoy the same Usages as Commoners ; if they prescribe the ordinary way, and the Lord cannot do them any prejudice at all, he can only take the Surplusage, leaving them sufficient ; if he feeds to their damage, it will be a Surcharge, and an Action upon the Case will lie against him.

The Lord cannot improve but he must leave them sufficient, and there can be no reason why the Owner should not have the Surplusage if any be.

I know they will cite an Authority against me in the Case between Webb and Littleburgh, which was in C. B. 1654. There, I confess, the Declaration was grounded upon a Prescription much like to this, and the Plaintiff had a Verdict, and the Court would not arrest Judgment upon it.

The Answer that I must give to that Case is grounded upon the difference between a Demurrer and a Verdict.

The Court may intend that after a Verdict, which may help it ; for I allow an exclusion of the Lord upon a Special Case disclosed in pleading, and that Special Matter may be supplied by the Verdict.

Besides I must observe, that it was a Case of small consequence that concerned the Lord only for his Costs, for he hath enjoyed his feeding against that Verdict ever since : I can say it upon my own knowledge, for I know the Parties, and know the Place, it was at Elniswell near Bury St. Edmonds in Suffolk. The Judges listen to Exceptions after a Verdict, but will give Judgment if there be any possibility to maintain it.

I may add that this was in Popular Times, when all things tended to the licentiousness of the Common People.

I shall Conclude, praying Judgment against this Prescription for these Reasons.

It is a new and unheard of way of Pleading, and against the Rule of Law, joyning Freehold Tenants, in the generality, which have no relation one to another, and annexing an entire Interest to several Estates, and mixing Prescription and Custom, which are of contrary Natures and are great Absurdities.

It is against Reason to oust the Owner of all the feeding, which for ought appears is all the Profits, without any Special Matter or Recompence appearing in Pleading.

There is great inconvenience in admitting of such a Prescription, new Inventions bringing unknown Consequences.

No inconvenience in ousting Tenants of this Prescription, seeing that they claim the same Usage the ordinary way, and the Lord can do them no wrong either by feeding or improvement.

In this Case the Court of Common-Pleas had been divided in Opinion upon the Matter in Law, as appears by Vaughans Reports; and therefore Sir Henry North thought not fit to waive the Matter of Law in the Kings Bench, altho' he had so good a Case upon the Fact, that if it had been no prejudice he would joyn Issue and try the truth of this Prescription at the Bar; whereupon the Demurrer was by consent waived, and the Cause tried at the Bar, and the Verdict passed for Sir Henry North, with the approbation of the whole Court.

Afterwards another Action was brought to trial in the Exchequer at the Bar, and it appearing to the Court that there had been Proposals towards an Agreement, a Juror was withdrawn, and my Lord Chief Baron Hale gave the Tenants advice to comply with this, saying Redime te caprum quam queas minimo.

So that the Matter of Law was never adjudged against Sir Henry North, but the Matter of Fact tried for him, and the main Question upon the Act of Level never came in Question, which may extend to this great Waste, altho' both the other Points were against Sir Henry North.

Afterwards there was another Action brought to trial in the Exchequer, and after a full evidence of about 4 or 5 hours, the Plaintiff not daring to stand the Verdict, was nonsuited.

THE
CASE
OF
Sir Robert Atkyns
AGAINST
HOLFORD CLARE,

Under-sheriff of the County of Gloucester;

TERMINO

Sancti Hillarij, Anno 22 & 23 Car. II.

In Scaecario.

[From the manuscript I have this appears a very important report as to the state of the law.]
Action upon the Case was brought by the Plaintiff, setting forth, That he was seised of the Seven Hundreds of Crochan, Bright, Reppegate, Bradley, &c. in the County of Gloucester, and had Return and Execution of Writs there: That the Defendant knowing of it, did Execute several Writs there to the Plaintiffs damage, &c. Upon Not Guilty pleaded Issue is taken, and this Special Verdict is found, (viz.)

They find the Patent of 11 May, 5 Johannis, whereby the King restores to the Abbot and Convent of Canons Regular, in Cirencester, certain Lands granted to them by his Brother Richard the first; and also grants, That no Sheriff of Gloucester, or his

Bayliff,

*more fully reported
in the 11th Rep.
page 100. T. H.
11th Rep. page 100
11th Rep. page 100*

Vid. Co.

Entr. 439.

a Quo War.

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Bayliff, do intromit in aliquo within the Seven Hundreds, except for Pleas of the Crown and Summons, which the Abbot, &c. should receive from the hands of the Sheriffs, and execute.

They find the Patent of 20 Decembris, 17 E. 3. wherein the King reciting that Richard the first, by Patent granted to this Abbot and Convent the Mannor of Cirencester and the Seven Hundreds, and the Return of Writs in them, that thereby they had used and enjoyed Retorna Brevium tanquam pertinentia ad Septem Hundred' prædict'. Reciting also, that by a Presentment made it was seized into the Chancery, and that He (Edward the Third) for a Fine of 300 l. grants that they should hold the Mannor, Hundreds, Vills, &c. & quod haberent in Villis & Hundredis prædictis, &c. absque impedimento retorna Brevium Infangthief, &c. tanquam pertinent' Hundredis prædictis, &c. of the King and his Successors &c. and confirms the Patent of King John.

They find, that the Abbot, &c. were seized prout Lex postular till 4 Febr. 27 H. 8. when the Monastery was dissolved and all came to the Crown.

They find the Statute for vesting of these Lands, &c. belonging to the Monastery in the King and the Statute of 32 H. 8. cap. 20. whereby it is Enacted, That all Liberties, &c. which the late Owners of Monasteries had used, &c. shall be revived and be really and actually in the King, his Heirs, &c. and shall be in the Rule, Order, Survey and Governance of the Court of *Augmentations*, and that the same Liberties, &c. shall be used and exercised by such Stewards, Bayliffs, &c. as the King, his Heirs, &c. shall name and appoint, &c. and that the said Stewards, Bayliffs, &c. shall be attendant and obedient to all the King's Courts for all Returns of Writs, &c. as the Officers of the late Owners should have been, &c. and that no Sheriff, Under-sheriff, &c. should intromit, meddle in, with or upon the Premises otherwise, or for other cause than they lawfully might have done before the same Premises came to the possession of the King.

They find, that Edward the Sixth (being seized by descent from Henry the Eighth) Anno primo of his Reign, per Lit' Patent' ex gratia & advisamento Concilii sui dedit & concessit cuidam *Tho. Seymour Mil'*, Dom' *Seymour de Sudley*, omnia illa Hundreda de *Crochen*, &c. nuper Monasterio *Cirecestrensi* dudum spectantia, &c. omnia Letas executiones Brevium & retorna eorundem Sect' Hundred', &c. reputat' spectant' & pertinent' Hundredis prædictis, &c.

They find, that the Lord Seymour being seized, &c. was Attainted of Treason (by Act of Parliament, 2 & 3 Ed. 6. cap. 18.) and that thereby his Lands and Hereditaments were forfeited and vested in the King.

They

They find, that 6 Octob. Anno 6 Ed. 6. the King grants the Hundreds, by his Letters Patents to Kingston and his Heirs, and therein grants omnia amerciamenta Heriotia emolumenta hereditamenta, &c. dictis Hundredis quoquo modo spectant' aut ut membrum sive pars eorundem antetunc cognit' reputat', vel usitat', vel habit' aut accept' ut pars parcell' vel membrum. And further grants, by another Clause, Tot talia & tanta & consimilia Jurisdictiones, Privilegia, Libertates, Franchisias, &c. quæ quib' qualia & quanta, & adeo plene & integre, as Thomas Lord Seymour, or any Abbot, &c. had, &c. ratione vel pretextu Hundred' prædict' virtute vel colore alicujus doni Chartæ, Præscriptionis, &c.

They find that the Estate which Kingston had, came to the Plaintiff, and that the Defendant entered into the Hundreds where the Liberty is claimed and executed several Writs, &c. Et si, &c.

Baron Wyndham had Argued; and was of Opinion for the Plaintiff; and Baron Littleton for the Defendant.

Now Argued Baron Turner, and my Lord Chief Baron Hale.

Turner, I am of Opinion for the Defendant. At the last Arguing my Opinion was for the Plaintiff; but upon something which fell from my Brother Littleton I am altered. The Case arises upon the Patents.

I take it to be clear that Return' brevium did not pass by the Patent of King John; there is indeed some implication of such a Franchise, but it is nothing like a Grant of it. 'Tis true, we must put that Exposition upon Ancient Charters, as should have been put in those days wherein they were made: But I say, this Patent would not have been expounded to have amounted to such a Grant in diebus illis. If there had been an Usage of such a Franchise in pursuance of this Patent (tho' made since Richard the first's time) I think it might have been allowed to have given the Return of Writs, Vid. 2 Inst. 282. But here has been no such Usage.

'Tis true, in the Patent of E. 3. it is recited, that there was an Usage, and that the Franchise was granted by Richard the first, and confirmed by King John; but the Juries finding of that Patent, is no finding of the things recited in it, as in the 10 Co. 56. q. the finding of Evidence of a Conversion, (scil. Refusal to deliver on Request) upon a Trover, is no finding of the Conversion.

In 17 Ed. 3. 'tis true, the Hundreds, and the Returns of Writs therein are granted: But since my Brother Littleton's Argument I have been, and am of Opinion, that that Grant is void, and that (as he observed) because of the Statute 2 Ed. 3. cap. 12. Ordaining, That henceforth Hundreds and Wapentakes should not be given nor severed from the Counties: And 14 Ed. 3. cap. 9. Ordaining,

Ordaining, That henceforth all the Wapentakes and Hundreds, which were severed from the Counties, should be rejoyned to the same Counties, as before that time had been established by another Statute, (meaning, I suppose, the said Statute of 2 E. 3. cap. 12.) And thereupon my Lord Coke in the 4 Inst. 267. gives his Opinion, That all the Grants made of the Bailiwicks of Hundreds since this Statute are void, and that the making the Bayliffs thereof belong to the Sheriff, for the better Execution of Justice and of his Office. And for that he cites a Resolution in his own Case; for he it was that was the Sheriff of Bucks, mentioned in the Case there. Fitzh. Petition 1. 18 E. 3. is a Case of a man, who by colour of the New Statute 'tis said was ousted of his liberty of Retorna Brevium, which was granted to him and his Heirs by the King in Parliament. My Brother Littleton cited a good Opinion of three Judges, that an Hundred could not be granted without a Non obstante to the Statute, and here is no Non obstante. Now a man cannot have the Return of Writs without the Hundred. Vid. 2 Inst. 452. 2 H. 4. pl. 12.

But admitting it did pass, and was granted before the Statute, then the Statute doth not extend to avoid that Grant. But then the Question will be, when the Liberties return to the Crown, Whether the Crown can grant them out again? And therein it will be considerable, Whether they are extinct in the Crown, or no? I think they are not extinct. In 9 Co. 25. b. 'tis said, that all Liberties, Franchises, &c. which were at first created and erected by the King, and were not Liberties, &c. in the hands of the King as flowers of the Crown, are not by their accession to the King drowned in the Crown; and there Hundreds and Leets are instanced in and allowed to be such. And now the Liberty of Retorna Brevium is more strongly such; for that all Jurisdictions (of which Hundreds, &c. are a Branch) were once in the Crown: But Retorna Brevium is but a Ministerial thing. It is expressly Adjudged in the Kings-Bench, Keilway 72. pl. 16. that the Liberties of Retorna Brevium are not extinct by coming to the Kings hands. But however, if they were or were not extinct and drowned, I think that they could not (because of the Statute) be severed and granted to Kingston.

Lord Chief Baron Hale:

I am of another Opinion; but I am very glad that two of my Brothers are against me, and my other Brother. I would have been glad to have been excused in this Matter,

First, Because the Case relates to my own County, and is much to the prejudice of it.

Secondly, Because it relates to Retorna Brevium, which I always took to be one of the most pernicious Liberties to the Common Justice of the Kingdom.

Thirdly,

Thirdly, Because it is a Case full of difficulty; but We that are Judges must satisfie our Judgments, and come to a Resolution, and I must Argue as the Law is, and not as I wish it. I Argue according to my Conscience, tho' somewhat against my desire, and I am sure against my particular Interest.

I shall be somewhat long, because the Case is very Intricate, and requires an Explication of many things.

In the first place I shall explain three Terms in the Case:

First, The Monastery of Cirencester.

Secondly, An Hundred.

Thirdly, Retorna Brevium.

First, As to the Monastery of Cirencester I shall speak a little Historically, to shew the tradition and derivation of this Matter. It was a Monastery time out of Mind; but in 30 H. 1. it was translated to the Canons Regular; and therefore Henry the first is accounted the founder, he Endowed it with three Hides of Land. Richard the first gave them the Mannor of Cirencester, and the Seven Hundreds, at the farm of 30 l. per annum. The Charter of Exemption (mentioned in the Verdict) was made by King John, who Confirmed the Grant of Richard the first at the same farm. This you shall find in Chartæ Antiquæ Letter G. (for the Book goes by Letters) Number 9, and the Letter M in Number 12.

Secondly, The next thing to be considered is an Hundred. Of old time Hundreds were parcel of the Crown, belonging to Common Right to the King, 11 H. 6. 89. pl. 44. by the Grant of an Hundred there did not pass only a Liberty, which had a Court and also commonly a Leet, which is called the Leet of the Hundred: But there was also an implied Power of making a Bayliff: The Bayliff had a double Office.

First, He had the Collection of Perquisites, Amerciaments, Fees, Ancient Duties, as Beupleader, Head, Silver, &c. belonging to the Hundreds in some places.

Secondly, He had another Office and that was relating to the Sheriff. In Ancient time the Bayliffs of the Hundreds were the immediate Bayliffs of the King for the Execution of Process. Vid. the Statute of Sheriffs made at Lincoln 9 Ed. 2. the second Statute; there 'tis said, that the Execution of Writs that come to the Sheriffs shall be done by Hundredors, (i. e. Lords, or rather Bayliffs of the Hundred) sworn and known in the full County, &c. which is Confirmed 2 E. 3. cap. 4. and 14 E. 3. cap. 9. This thing of farming out Hundreds to persons thus, grew to be a great Inconvenience: For the Hundreds which were of the County, and did belong to the Sheriff, there was no Inconvenience; the Sheriff did sometimes Account as Custos, sometimes per Manus. Then those many Provisions were made, viz. 2 E. 3. cap. 12. whereas

all the Counties in England were in Old time Assessed to a certain Farm; and then were all the Hundreds and Wapentakes in the Sheriffs Hand rated to this Farm, and after were Approvers sent into divers Counties, which did increase the Farms of some Hundreds and Wapentakes. And after the Kings at divers times have granted to many men part of the same Hundreds and Wapentakes for the old Farms only. And now of late the Sheriffs are wholly charged of the Increase, which amounteth to a great Sum, to the great hurt of the People and disorder of the Sheriffs and their Heirs. It is Ordained, that the Hundreds and Wapentakes set to farm by the King that now is, be it for Term of Life or otherwise, which were sometimes annexed to the Farms of the Counties where the Sheriffs be charged, shall be adjoynd again to the Counties, and that the Sheriffs and their Heirs have Allowance for the Time that is past, and that from henceforth such Hundreds and Wapentakes shall not be given nor severed from the Counties. Then 14 E. 3. cap. 4. Whereas many Mischiefs be happened throughout the Realm, for that Sheriffs have lett the Hundreds and Wapentakes to a higher Farm than they do yield to the King, and the Farmers do lett the same to others at higher and greater Sums in such manner, that by the letting and enhancing of the Farms, and by the Greater number of Bayliffs Errants, Outriders and others, whom the Sheriffs Bayliffs and Hundredors do put in, the People be in divers manners charged and grieved: It is assented and accorded, That from henceforth all the Wapentakes and Hundreds which be severed from the Counties, shall be rejoyned to the same Counties, as before this time hath been established by another Statute, and that the Sheriffs hold the same in their own Hands, and put in such Bayliffs and Hundredors, having Lands within the same Bayliffs and Hundreds for whom they will Answer: And if they will Lett any Hundreds, Bayliwicks or Wapentakes to farm, they shall lett the same at the ancient Farm without any thing increasing, and that the King and his People be served by such Bayliffs and Hundredors, and their Under Bayliffs, in avoiding for ever the Outriders and others, which in divers Counties before this time have notoriously grieved the People: And that no Bayliff Errant be but in the County where Bayliffs Errants have been in times past, in the time of the King's Grandfather that now is, and that there be no more but one Bayliff Errant in one County: And in the same manner it is assented, That all other, of what Estate or Condition they be, which have Bayliwicks or Hundreds in fee, if they the same will hold in their own Hands, then they shall put in such Bayliffs for whom they will Answer; and if they will lett the same in Farm to other, then they shall lett the same at the ancient Farm without any thing increasing, as aforesaid is said, &c.

For the Sheriffs did Farm at a certain Rate, and did Account for it in the Exchequer, and this was called Firmi Ballivarum.

Hundreds were either parcel of the County, and there the Sheriff did constitute Bayliffs, (these Hundreds which were anciently parcel of the Farm of the Sheriffs, that the Stat. of the 2 Ed. 3. cap. 12. speaks of;) or else they were such as were granted out, which the Lord of the Hundred held sometimes at Farm, and sometimes in Fee, called Hundreds of Fee, Liberties of Hundreds, Franchises of Hundreds.

It was found that a great Inconvenience grew from the severing of Hundreds from the Counties. The Statute intended that the Sheriff should execute Writs, &c. and it was unreasonable that he should have Bayliffs put upon him, and yet be bound to execute, &c. therefore the Statute intended to reconcile this as far as it could well, and to restore as many of the Hundreds as could well be, to the Sheriff.

Thirdly, I come to the Third thing to be Explained and Considered, viz. the Liberty of Retorna Brevium.

This is a superadded Liberty; tho' the Hundreds were granted, yet the Sheriff might and must still Return the Writs executed there. This Liberty was commonly annexed to the Grants of Hundreds, tho' sometimes of Mannors it is acquirable by Grant, and (I think) by Prescription, tho' that has been a Doubt: But 8 H. 4. c. 7. pl. 10. speaks of Retorna Brevium by Prescription, And it was Adjudged it might be so in the Quo Warranto brought by the Queen against the Earl of Shrewsbury, for Retorna Brevium and other Liberties claimed by the Earl in Coleharborow in London. You will find the Pleading in the New Entries, Quo Warranto pl. 2. Mich. 41 & 42 Eliz. in Banco Regis.

Vid. Mo.
670. contr.

'Tis true, It was Adjudged against the Earl; but it was Agreed that a man might prescribe for Retorna Brevium, and that to have it within a House only; for that Place was formerly the Bishop of Durham's Mansion House.

But the Prescription was naught, because it was applied only to the Return of the Writs of the Queen: for he laid a Prescription (in the Bishop of Durham) to have Retorna omnium Brevium Preceptorum & Mandatorum dictæ Dom' Regine, and says not of her Predecessors; and it is plainly impossible, that a man should have time out of mind the Return of the Queens Writs, when the Queen began her Reign within time of Memory.

This Retorna Brevium carries in it (by Implication) the Execution of Writs, tho' it be not express, as in the last preceding Case, where after the Words above mentioned is added, & Executionem eorundem.

And so it was Adjudged in the Case of the Countess of Warwick against Atwood, Pasch. 41 Eliz. Rot. 33 1-B.R.

This Liberty, tho' it carries an Exemption, yet it doth not exclude, but that the Sheriff may execute Writs within it. But then it is a Wrong, for which the Lord of the Liberty may have his Action: But in some Cases the Sheriff may lawfully do it, as in the Case of the King, a Non omittas, &c. in case of Execution of a Writ of Waste, whereto he is particularly Empower'd by the Statute, and sometimes where the Thing is divided, &c.

But I shall add no more concerning this, but only say,

First, This Liberty of Retorna Brevium is a dangerous Liberty for him that hath it; for he is to be Responsible for all the Defaults of his Bayliffs, as Escapes, &c. And if the Bayliff do not Account for the Collection of the King's Revenue, &c. 'tis a Feather in his Cap, but a Thorn in his Foot.

Secondly, 'Tis much derogatory to the Justice of the Kingdom: For the party must go to the Sheriff first, then to the Bayliff, &c. and by this means Justice is delayed and disappointed.

There are two Liberties do abundantly more hurt than they are worth, (viz.) the Grants of Fines, especially of Jurors, and this of Retorna Brevium: Therefore Edward the first, a most Wise Prince, Declared in Parliament, and it was Recorded in the Courts, That he would not grant it. This you will find in the Pleas of Edward the first, towards the latter End, in Mr. Ryley. The Passage meant is in Placita Parliamentaria 35 Ed. 1. fol. 366. in Mr. Ryley, it is this,

Præceptum Domini Regis,

LE Roy ad Dit & Commande, Quod après cest Grant qu'il ad fait al un Counte de Nicole, de Return de Brief avoir, en deux Hundreds à terme de la vie du dit Counte, le Roy ne voet doner ne granter a nulluy tiel Franchise tant come le Roy vivra, s'il ne soit a ses Enfantès demesne, & ceo voet le Roy que soit Escrit en le Chancellerie, en Gardrobe, & al Eschequer.

Thirdly, A Grant of this Liberty was within a certain Precinct, and could not extend to a County, 2 H. 4. For as my Lord Coke observes on W.2. cap. 39. 2 Inst. 452. A Grant to have Return of Writs in a County is void; for in effect it taketh away the Office of a Sheriff.

By that time I have applied these Observations, I shall in effect have done.

First, It is to be Considered, Whether the Charters of King John did Create the Return of Writs, or no? seeing there are only Negative,

Negative, no Positive Words in it. Somewhat may be said to maintain this to be a good Grant of Retorna Brevium, but because the contrary has been admitted, I will admit it too, especially because the scope of the Patent was, that the Abbot should be immediate Officer to the King; and the intention of the Charter was to exclude the Sheriff, and that does appear by the conclusion, where an Exception is made of the Sheriffs Power of meddling per Summonitionem, &c. and so it is like the Case of the Town of Berwick in 5 Jacobi, a Grant to them that they should be a County, but no Grant of having a Sheriff, was adjudged to be void, because there would be no Officer to execute and do Justice. I do observe that 13 Ed. 3. in the Iter there was an Information against this Abbot, and he pleaded the Charter of R. 1. but there is nothing of Retorn of Writs that I can find, and I have read the Book over.

Secondly, We come to consider the Grant of E. 3. I say,

1. It is a good Grant of Retorna Brevium.
2. There is a good annexation of it to the Hundreds by reason of these words *tanquam pertinent' Hundredis predict'*, for even at this day such a thing as Common of Estovers, &c. may be granted appurtenant. Sacheverell against Porter, 13 Car. 1. 1 Cro. 482. 1 Rolls 400. 11 H. 6. 11 Pl. 27. Now then by this Patent here is a Retorna Brevium, not only newly created, but newly created appurtenant, and especially since here is a kind of cognation between the things, this may very well be; in like manner may Cognissance of Pleas be granted, if the King should grant that a Lord of an Hundred should have *cognitionem omnium placitorum*, &c. *tanquam pertinent' Hundred'*, &c. It would create Cognissance of Pleas appurtenant to the Hundred; for it being a Creature of the Kings it may be created as he pleases, either in gross or as appurtenant; for a thing appurtenant may be by Grant, though a thing appendant must be by Prescription.

Well now, this Abbot is seised of this Liberty *quodammodo* appurtenant.

3. When the Monastery, &c. comes to be dissolved and given to the King, it is to be considered what becomes of this Liberty then? I conceive this Liberty is in the hands of the King, as it was in the hands of the Abbot, (*viz.*) as appurtenant, and that without the aid of the Statute of 32 H. 8. c. 20. It is adjudged Keilway 72. Pl. 16. that this Liberty of Retorna Brevium when it comes to the King, remains in the Crown, and is not extinguished, rejoined or drowned thereby.

And this Liberty is not by this coming to the Crown, reannexed to the County, but if that were a Question, the said Statute of 32 H. 8. hath put it out of question, for by that Statute it is in the same state that it was before. 'Tis true, the King might

might rejoyne it to the County, but till he does, it continues a Liberty distinct, an Hundred in gross, and the Sheriff shall write Ballivo Dom' Regis, &c. 'Tis true, if a man forfeit such a Liberty by non user or misuser, the Sheriff shall enter into it, and do, and execute as in other parts of the County, because in that case the King comes in in disaffirmance of the Liberty, but otherwise it is where the King comes in under a Subject, as in the Bar case he does.

Fourthly, We come to consider what alteration is made in the Case by the Grant to Seymour and his Attainder: As to this I must observe, that the Verdict is ill found, for 'tis concessit, &c. Dom' Seymour, &c. but not found what Estate, and here is a breaking off in the middle, of which we cannot tell what to make. Now when the King Grants, and expresses no Estate, some Books have held the Grant to be void; but the better Opinion is, that it creates an Estate at will, 5 E. 4. 8. (the last Leaf) B. Pl. 1. but 17 E. 3. 45. Pl. 46. is express in it, and so it was adjudged Davis 45. Paschæ 8. Jacobi in Petfall's Case.

Why then the consequence will be, that by the Attainder the Will was determined, and then the King was in of his Old Reversion, and then the Statute of 32 H. 8. served well to preserve the Liberty in the same Estate still. But if the Grant were in Fee, then the King came in by a New Title, viz. the Attainder, and then there is no benefit of the said Statute; so that this Error in the Verdict is most to the disadvantage of the Party (the Defendant.) who would not amend it; for there was a Proposal and Discourse of amending, and some things were amended; but the amending of this Mistake would not be consented to by the Defendant. But to suppose this to be a Grant in Fee, I say still it stood of it self a Liberty without the Statute, and so when it returned to the Crown by Attainder, it stood not in need of any such Statute, it was Substantive and not melted down in a General Confusion into the Form whence it was derived.

Fifthly, Come we now to the Grant to Kingston: It has many Clauses in it, I will insist upon two.

1. The King Grants Omnia Amerciamenta, &c. with large words, Cognita, Reputata, Acceptata, &c. I did say that the Grant of E. 3. made an annexation of this Liberty of Ret' Brev. to the Hundreds; and if we should admit that, it were not sufficient to create an appurtenancy in reputation; and if it were no more than so, these words would lay hold on it.

2. The other Clause I will rest upon; thereby the King grants tot talia & tanta, &c. as any, &c. had ratione vel pretextu Hundred' prædict' virtute pretextu, vel colore alicujus Doni, Chartæ, &c. Now certainly the latter words are subservient and ancillary

lary, and the *ratione vel pretextu* Hundredi governs all, for it is but one entire Sentence, like *Finches Case*, 6 Co. 39. This *pretextu* is a very large Clause and much more than *tot talia & tanra*, wherefore I conclude, that it is a good and sufficient Grant of the thing in Question.

Three Objections have been made, to which I shall endeavour to give Answers.

Object. 1. By the coming to the Crown the Liberty is merged.

Ans. 1. It is not.

2. Admit it were merged thereby, yet that is not till the dissolution. Why now in this last Grant there is a Retrospect, and it is with a leaping over to the Seisin which the Abbot had, and therefore the Grant of the King conjoyning it to the possession of the Abbot, the Liberty is effectually revived and erected in the same manner and condition as it was before the uniting of it to the Crown.

Object. 2. If this Liberty be to be revived, yet 'tis not revivable without Special Words; in the Grant to *Seymour* there are the words *Retorna Brevium*, but in the Grant to *Kingston*, not.

Ans. *Tot talia*, &c. does it, and 'tis as much as if all had been particularly recited, because it refers to a thing determinate.

'Tis true, if there were an Act of Resumption, as in *Pager and Darcy's Case*; or if the thing were merely Personal, as in the Abbot of *Walchams Case*, the privilege for his Dogs in the Forrest, such General Words will not revive and pass the things, because of the *ratio privata* which intervenes; but if there be nothing in the Case (which hinders) more than the generality of the words, 'tis clear the words do it; no Case can be fuller than *Ameredichs Case* is in this point, 9 Co. 29. B. 30. in the Case of *Coleharborow* above-mentioned. The *Ret Brev*, &c. came to the Crown by Act of Parliament. The King Ed. 6. grants to *Francis Earl of Shrewsbury* the House, & quod habeat *tot talia*, &c. specially reciting many Privileges, Liberties, &c. but not mentioning *Retorna Brevium*, and concludes, & alia, &c. and it was adjudged that this Grant in these general words did revive *Retorna Brev* (for I have a Report of the Case) but only for the Cause above-mentioned Judgment was given against the Earl as to the thing.

This Verdict is ill found, the effectual Statute which should aid this Case if there were need is 1 Ed. 6. c. 8. which is not found; thereby it is Enacted, That all Letters Patents, &c. made or to be made by the King of any Honours, &c. Franchises, Liberties, &c. should be good, sure, &c. notwithstanding any misnaming, misrecital or nonrecital of the Premises, or the lack of the true naming
of